(24,524)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 330.

SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE CITY OF RALEIGH AND JAMES I. JOHNSON, O. G. KING, AND R. B. SEAWELL, COMMISSIONERS OF THE CITY OF RALEIGH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

INDEX.

Judd & Detweiler (Inc.), Printers, Washington, D. C., November 4, 1915.

a UNITED STATES OF AMERICA,
Eastern District of North Carolina, To wit:

At a District Court of the United States for the Eastern District of North Carolina, Begun and Held at the Court-house in the City of Raleigh, on the 23 Day of November, A. D. Nineteen Hundred and Fourteen (1914).

Present: The Honorable Henry G. Connor, Judge of the District Court for the Eastern District of North Carolina.
Among others were the following proceedings, to-wit:

1 Filed June 27th, 1913.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Bill of Complaint.

The Seaboard Air Line Railway brings this, its bill of complaint, against the City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the city of Raleigh, and complains and says:

1. That the complainant, Seaboard Air Line Railway, is a corporation created and existing under the laws of the States of Virginia, North Carolina and other States, and having its principal place of business in the city of Portsmouth, in the State of Virginia, and owning and operating a line of railroad extending into and through the State of North Carolina, and doing the general business of a common carrier in the transportation of freight and passengers in and through said State, and a large portion of said business is interstate transportation.

2. That the defendant, City of Raleigh, is an incorporated town in the State of North Carolina, in the Eastern District thereof; and the defendant James I. Johnson, a citizen and resident of said City is Mayor and Commissioner of Finance of the City of Raleigh, and the defendant, O. G. King, a citizen and resident of said
2 City, is Commissioner of Public Safety of the City of Raleigh, and the defendant R. B. Seawell, a citizen and resident of said city, is Commissioner of Public Works of the City of Raleigh, and the said Commissioners constitute the governing body of said

City, with authority granted by law to enact and enforce ordinances for the government of said city and for the control of its property.

3. That the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, and arises under the Constitution of the United States.

4. That by an act of the General Assembly of North Carolina, at its Session of 1835 (2 Revised Statutes, page 299) the Raleigh & Gaston Railroad Company was incorporated for the purpose of effecting a communication by railroad from some point in or near the City of Raleigh to the termination of the Greensville and Roanoke Railroad at or near Gaston, and for providing everything necessary and convenient for the purpose of transportation on the same; and the President and Directors of said company were invested with all the rights and powers necessary for the construction, repair and maintaining of a railroad, to be so located, with as many sets of tracks as they or a majority of them should deem necessary; and the President and Directors of said Company were authorized to cause to be made and to make and continue all tracks whatever necessary and expedient in order for the proper completion of said railway.

5. That acting under the charter granted by the General Assembly of North Carolina the incorporators of the Raleigh & Gaston Railroad Company constructed and operated a line of railroad from Raleigh, North Carolina, to Gaston, North Carolina, and constructed in the City of Raleigh terminals and depots for the receipt and delivery of freight and passengers, and constructed in the said City on Halifax Street, between Lane and North Streets, a freight depot and warehouse, extending from Halifax Street back
3 to Salisbury Street, and constructed its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury Street into said depot and warehouse.

6. That about the year 1881 a cotton compress was constructed on a lot in the City of Raleigh bounded by Salisbury, Jones, Halifax and Lane Streets, and in order to receive cotton from and deliver cotton to said compress, and in order to serve the patrons of said railroad and to furnish the public facilities for the receipt and delivery of freight in carload lots, and in order to better perform its functions as a common carrier, the Raleigh & Gaston Railroad Company made application to the Board of Aldermen of the City of Raleigh for the grant of the right, privilege and franchise to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of constructing thereon a track.

7. That by and through its Board of Aldermen, at a meeting held on August 5th, 1881, the City of Raleigh, acting under and by virtue of the laws of the State of North Carolina, and its charter, then in effect, duly passed an ordinance granting to the Raleigh & Gaston Railroad Company the right, privilege and franchise to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track as will appear from the following extract from the minutes of said meeting:

"Upon application of John C. Winder, Gen. Supt. the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

8. That the said ordinance was accepted by the Raleigh & Gaston Railroad Company and pursuant to the right, privilege and franchise thereby granted a track was laid at great expense to the said railroad company along the said sidewalk and from the time of its completion in 1881, to the present time, it has been constantly used by the Raleigh & Gaston Railroad Company, and its successor and
4 assign, Seaboard Air Line Railway, as a public track for the general delivery and receipt of freight for intrastate and interstate transportation, and on account of the convenience of location it has been and is now largely used by the merchants of the City of Raleigh and by the public generally and has been since its completion, and is now an important and necessary factor in the conduct of the business of the Raleigh & Gaston Railroad Company, and the Seaboard Air Line Railway as common carriers.

9. That the Raleigh & Gaston Railroad Company, acting upon the authority granted by the City of Raleigh through its Board of Aldermen, with the knowledge of the municipal authorities of said city, proceeded to exercise the right, privilege and franchise so granted, and constructed said track; and the Raleigh & Gaston Railroad Company, and its successor and assign, Seaboard Air Line Railway, have maintained and operated said track since 1881, and the City of Raleigh, by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of said sidewalk, is estopped from asserting that no ordinance has been passed, or that the necessary steps have not been taken to effectuate the grant to the said Raleigh & Gaston Railroad Company of the right, privilege and franchise to use said sidewalk.

10. That under and by virtue of the laws of the State of North Carolina, the Raleigh & Gaston Railroad Company has been merged and consolidated with the Seaboard Air Line Railway; and the Seaboard Air Line Railway, as the successor and assign of said Raleigh & Gaston Railroad Company, is the owner of and entitled to all the property, rights, privileges and franchises belonging to said Raleigh & Gaston Railroad Company, including the right, privilege and franchise of maintaining and operating a track on the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, in the City of Raleigh.

11. That on June 10th, 1913, the Commissioners of the City of Raleigh, James I. Johnson, O. G. King and R. B. Seawell,
5 at a regular meeting, over the protest of the Seaboard Air Line Railway, passed the following ordinance:

"Upon the hearing of the matter of the removal of the spur track of railroad used by the Seaboard Air Line Railway and situated on the street and sidewalk on the east side of North Salisbury Street in the City of Raleigh, between Jones and Lane Streets, it is

"Ordered that the Chief of Police of the City of Raleigh notify the said Seaboard Air Line Railway to remove said spur track, cross

ties and rails and all other material constituting said track from said street and sidewalk within thirty days from the date of this order.

"It is further ordered that if the said Seaboard Air Line Railway shall fail to remove said spur track within the said thirty days, that the Commissioner of Public Works of the City of Raleigh be, and he is hereby authorized, empowered and directed to forthwith remove said spur track, cross ties, rails and all other material from said street and sidewalk at the cost and expense of the said Seaboard Air Line Railway.

"This 10th day of June, 1913."

A copy of the said ordinance was served on the Seaboard Air Line Railway on June 10th, 1913.

12. That by the enactment of the ordinance granting the Raleigh & Gaston Railroad Company the right to occupy the sidewalk on the east side of Salisbury Street, and by the conduct as set forth, herein, of the City of Raleigh, through its officers and representatives, and by the acceptance of said ordinance and by the construction and maintenance and use of a side track along said sidewalk for public purposes, with the knowledge and acquiescence of the minicipal authorities, a valid and binding contract has been created between the City of Raleigh and the Raleigh & Gaston Railroad Company, and its successor and assign, Seaboard Air Line Railway, which is impaired by the ordinance of June 10th, 1913, in violation of Section 10, Article 1, of the Constitution of the United States; and the complainant hereby expressly sets up and relies upon said Article and Section of the Constitution of the United States in protection of its rights, and against the enforcement of said ordinance.

13. That the enforcement of said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article 11, conferring upon Congress the power to regulate interstate com-
6 merce, and in violation of the acts of Congress passed pursuant to the power so granted; and the complainant hereby expressly sets up and relies upon said Article and Section of the Constitution of the United States in protection of its rights, and against the enforcement of said ordinance.

14. That the enforcement of said ordinance will result in taking the property of the Seaboard Air Line Railway without due process of law, in violation of the Constitution of the United States, Section 1, Article XIV; and the complainant hereby expressly sets up and relies upon said Article and Section of the Constitution of the United States in protection of its rights, and against the enforcement of said ordinance.

15. That the said track constructed on the sidewalk of Salisbury Street is a great convenience to the merchants of the City of Raleigh and to the public generally, and results in securing for the Seaboard Air Line Railway freight that would otherwise *to* transported by its competitors, and the amount of revenue, of which it would be deproved by the enforcement of said ordinance, would in time greatly exceed the sum of Three Thousand ($3,000.00) Dollars; and by the enforcement of said ordinance the Seaboard Air Line Rail-

way will be deprived of its property and property rights of a value greater than Three Thousand ($3,000.00) Dollars.

16. That the exercise of the right, privilege and franchise which will be destroyed by the enforcement of said ordinance is of a value and benefit to the Seaboard Air Line Railway in excess of the sum of Three Thousand ($3,000.00) Dollars; and the enforcement of said ordinance will impair the franchise of the Seaboard Air Line Railway and the value of its property to its irreparable damage.

17. That by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company had the power, with the assent of the municipal authorities of the
7 City of Raleigh, to occupy the said sidewalk for the purpose of running a track thereon, the said power being specifically granted by the Acts of the General Assembly of North Carolina, Session 1871-2, Chapter 38, Section 29, Subsection 6, as brought forward and amended by the Code Sections 1957 and 1982 and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) To construct their road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plank road and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be construed to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That this statute has been construed and held by the highest Court of the State to apply to branch and spur tracks not a part of the main line, but used in connection therewith, and to authorize the construction of such tracks in the streets of a municipal corporation, with the consent of the municipal authorities.

18. That the said side track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the Acts of the General Assembly of North Carolina, Session of 1871-2, Chapter 38, Section 29. Subsection 6, Code of 1883, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, with the assent of the City of Raleigh; and the enforcement of the ordinance enacted by the Commissioners of the City of Raleigh on June 10th, 1913, will impair the obligations of the contract thereby created, in violation of Section 10, Article 1 of the Constitution of the United States, the provisions of which said article and Section are again set up and relied upon by the complainant in protection of its rights, and against the enforcement of said ordinance.

19. That the maintenance and operation of the said side track in Salisbury Street, between Jones and Lane Streets, does not
8 unnecessarily impair its usefulness, because the full width of the street and the sidewalk on the west side of the street are

open and free, and the said track occupies only the sidewalk on th east side of the street, on which the complainant is the sole abuttin property owner; and the physical conditions are such that the unol structed street and the sidewalk on the west side thereon meet all th requirements of the public for the use of Salisbury Street, betwee Jones and Lane Streets.

20. That the lapse of time, more than thirty-one (31) years, du ing which the said track has been continuously maintained and ope ated along the said sidewalk has created in the Raleigh & Gasto Railroad Company, and its successor and assign, Seaboard Air Lin Railway, the right to retain said track, which right constitutes contract, subject to the protection of Section 10, Article 1, of th Constitution of the United States, and the enforcement of the ord nance of June 10th, 1913, will result in impairing the obligation of said contract, in violation of the provisions of the Constitution o the United States, the protection and benefit of which said Article an Section of said Constitution the complainant hereby expressly sets u and relies upon.

Wherefore, the complainant, Seaboard Air Line Railway pray that the Court grant unto it a writ of injunction, commanding th said City of Raleigh, and all persons claiming to act under its au thority, direction or control, and commanding James I. Johnson O. G. King and R. B. Seawell, Commissioners of the City of Raleigh and all persons claiming to act under their authority, direction o control, absolutely to desist and refrain from attempting to enforc the said ordinance of June 10th, 1913, and to desist and refrain fro removing or attempting to remove the track of the Seaboard Ai Line Railway from the sidewalk of Salisbury Street, in the City o Raleigh, between Jones and Lane Streets, and to desist from, in an manner, hindering or obstructing the complainant, or its agents servants, or employees, in the use of said track and from in any man ner interfering with said track, until such time as the Cour 9 shall appoint and direct an order herein; and that upon such hearing the writ herein prayed for be made and confirme until the final determination of this suit, and that upon the said in junction may be made perpetual.

JAMES H. POU,
MURRAY ALLEN,
Attorneys for Complainant,
Seaboard Air Line Railway.

NORTH CAROLINA,
Wake County:

W. T. Huntley, being duly sworn, deposes and says that complain ant, Seaboard Air Line Railway, is a corporation; and that he is it Agent at Raleigh, N. C.; that he has read the foregoing bill of com plaint; and that the same is true of his own knowledge, except as t matters therein stated upon information and belief; and, as to thos matters, he believes it to be true.

W. T. HUNTLEY.

Subscribed and sworn to before me this 27th day of June, 1913.

C. T. McDONALD,
Notary Public, Wake County.

My Commission expires the 1st day of February, 1914.

Marshal's Return.

Received the within Bill of Complaint at Raleigh, N. C., June 27th, 1913, and executed at Raleigh, N. C., June 27th, 1913, upon the City of Raleigh by delivering a copy of within Bill of Complaint to Jas. I. Johnson, Mayor, and upon Jas. I. Johnson Commissioner, O. G. King, Commissioner and R. B. Seawell, Commissioner, by delivering a copy to each.

CLAUDIUS DOCKERY,
U. S. Marshal,
By R. W. WARD,
Office Deputy Marshal.

Marshal's cost $8.00.

10 Filed June 27th, 1913.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

District Court at Raleigh, Fourth Circuit.

SEABOARD AIR LINE RAILROAD
against
CITY OF RALEIGH, JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh.

Prosecution Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, as principals, and Fidelity and Deposit Company of Md., as surety, are held and firmly bound unto the defendants in the above entitled action, in the sum of two hundred dollars, to the payment of which we bind ourselves firmly by these presents. Sealed with our seals and dated this 27th day of June, 1913.

The condition of the above obligation is such, that whereas the plaintiff in the above named cause has brought an action against the said defendants therein; Now, if the said plaintiff shall prosecute said action with effect, or, in case it fail therein, shall well and truly pay all such costs as shall be awarded and recovered against the said plaintiff in said action, then the above obligation is to be void, otherwise it is to remain in full force and effect.

SEABOARD AIR LINE RAILWAY,
By MURRAY ALLEN, *Attorney.* [SEAL.]
FIDELITY & DEPOSIT CO. OF MD.,
By R. W. WINSTON, [SEAL.]
Attorney-in-Fact.
R. E. BARNES, *Agent.*

11 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

District Court at Raleigh, Fourth Circuit.

Equity Subpœna.

The United States of America to City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of the City of Raleigh, Greeting:

We command you, and every of you that you appear before the Judges of our District Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh, in said District, twenty days from the date hereof and answer the bill of complaint of Seaboard Air Line Railway, a citizen and resident of the States of Virginia and North Carolina, filed in the Clerk's office of said Court, in said City of Raleigh, then and thereto receive and abide by such judgment and Decree as shall then or thereafter be made, upon paid of judgment being pronounced against you be default.

To the Marshal of the Eastern District of North Carolina to Execute.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District, the 27th day of June, 1913, and in the 137 year of the Independence of the United States.

Issued the 27th day of June, 1913.

H. L. GRANT,
Clerk United States District Court.

The within named defendants are notified that, unless they enter their appearance in the Clerk's Office of said District Court at Raleigh, and file their answer or other defense, on or before the 20th day after service hereof, excluding the day of service, the bill filed herein will be taken as confessed and a decree entered accordingly.

H. L. GRANT,
Clerk United States District Court.

12 *Marshal's Return.*

Received the within Equity Subpœna at Raleigh, N. C., June 27th, 1913, and executed June 27th, 1913, at Raleigh, N. C., upon the City of Raleigh, by delivering a copy of the within Equity Subpœna to Jas. I. Johnson, Mayor, and upon Jas. I. Johnson, Commissioner, O. G. King, Commissioner, and R. B. Seawell, Commissioner by delivering a copy to each.

CLAUDIUS DOCKERY,
U. S. Marshal,
By R. W. WARD,
Office Deputy Marshal.

Marshal's costs $8.00.

13 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Notice.

To the City of Raleigh and James I. Johnson, Mayor and Commissioner; O. G. King, and R. B. Seawell, Commissioners, defendants in the above entitled suit:

You *are* each of you, are hereby notified that complainant Seaboard Air Line Railway, will apply to Hon. Henry G. Connor, Judge of the District Court of the United States for the Eastern District of North Carolina, at Chambers, in Wilson, North Carolina, on Monday, the 7th day of July, 1913, at ten o'clock, A. M., or as soon thereafter as it can be heard, for an injunction and restraining order, enjoining and restraining you, and each of you, from putting into effect, or attempting to put into effect, a certain resolution, in the form of and called an ordinance, adopted by the Commissioners of the City of Raleigh, on the 10th day of June, 1913, relative to the removal of the side track of complainant, situate on the east side of North Salisbury Street, between Jones and Lane Streets, in the City of Raleigh, N. C.

14 Said application for an injunction and restraining order will be based upon and supported by complainant's bill of complaint filed in the above entitled suit, copies of which are attached to the subpœnas issued in this suit.

Respectfully,

SEABOARD AIR LINE RAILWAY, *Complainant,*
By JAMES H. POU,
MURRAY ALLEN,
Counsel.

Raleigh, N. C., June 27th, 1913.

Marshal's Return.

Received the within Notice to Defendants at Raleigh, N. C., June 27th, 1913, and executed June 27th, 1913, upon the City of Raleigh by delivering a copy of the within Notice to Defendants to Jas. I. Johnson, Mayor, and upon Jas. I. Johnson, Commissioner, O. G.

King, Commissioner and R. B. Seawell, Commissioner, of the City of Raleigh, N. C., by delivering a copy to each.

CLAUDIUS DOCKERY,
U. S. Marshal,

By R. W. WARD,
Office Deputy Marshal.

Marshal's cost $8.00.

15 Filed July 8th, 1913.

In the District Court *for* the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,

vs.

CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Injunction.

This cause coming on to be heard upon motion of complainant for an injunction restraining and enjoining the defendants from attempting to enforce an ordinance of the City of Raleigh of June 10th, 1913, directing the removal of the track of the complainant from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Streets in the City of Raleigh and restr-ining and enjoining the defendants from removing or attempting to remove said track until the hearing of this cause, and the City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of the City of Raleigh, defendants, by their counsel, consenting to an order awarding such injunction until the hearing.

Now, therefore, by consent of the parties to this action, it is ordered that you the said City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, defendants herein, your agents and servants and all persons claiming to act under your authority, direction and control, be and you are hereby specifically restrained and enjoined from attempting to enforce the ordinance of the city of Raleigh adopted June 10th,

16 1913, directing the removal of the track of the complainant, Seaboard Air Line Railway from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Street in the City of Raleigh, and you are hereby specially restrained and enjoined from removing or attempting to remove said track and from in any manner hindering or obstructing the complainant or its agents, servants or employees in the use of said track until the hearing of this cause on October Rule Day of this Court, it being the 6th day of October, 1913.

It is, by consent, further ordered that the defendants may have

until September 1st, 1913, in which to file their answers to the bill of complaint.

It is further ordered that a copy of this order certified under the hand and seal of this Court be served on each of the defendants to be restrained and enjoined thereby.

Dated at Raleigh, N. C., this 8th day of July, 1913.

[SEAL.] H. G. CONNOR,
Judge of the United States District Court,
Eastern District of North Carolina.

Marshal's Return.

Received July 8th, 1913, and executed same day at Raleigh, N. C., by delivering copy of within Injunction each to James I. Johnson, Mayor, for City of Raleigh, James I. Johnson, Commissioner, O. G. King, Commissioner, etc. and R. B. Seawell, Commissioner, etc. all of the city of Raleigh, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal.

Fees $8.00.

17 Filed July 8th, 1913.

In the United States District Court for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY
vs.
CITY OF RALEIGH, JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners.

It is agreed that the above matter which was set for hearing before His Honor, Henry G. Connor, Judge of the United States District Court for the Eastern District of North Carolina, on July 7th, 1913, at Wilson, N. C., may be heard at Raleigh, N. C., and the notice of the hearing at Wilson will be treated as notice of the hearing at Raligh. N. C., on July 7, 1913.

JAMES H. POU,
MURRAY ALLEN,
Attorneys for Complainant.
JOHN W. HINSDALE, JR.,
Attorney for Defendants.

18 In the District Court of the United States, Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh.

Order Continuing Injunction.

This cause coming on to be heard on this 6th day of October, 1913, upon the injunction issued on the 8th day of July, 1913: Now, by consent, it is ordered that the said injunction be continued to the 25th day of November, 1913.

H. G. CONNOR,
Judge United States District Court, Eastern District of North Carolina.

19 Filed Sept. 10, 1913.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Answer.

The City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of the City of Raleigh, defendants in the above entitled cause, answering the bill of complaint filed herein say:

1. That the allegations of Paragraph One of the bill of Complaint are admitted.
2. That the allegations of Paragraph Two of the Bill of Complaint are admitted.
3. That the allegations of Paragraph Three of the Bill of Complaint are denied.
4. That the allegations of Paragraph Four of the Bill of Complaint are admitted.
5. That the allegations of Paragraph Five of the Bill of Complaint are admitted.
6. That the allegations of Paragraph Six of the bill of Complaint

are denied, except that it is admitted that about the year 1881 a cotton compress was erected on the site named and for the purposes named, and that permission was requested by the said Railroad, of the Board of Aldermen of the City of Raleigh to use the sidewalk on the east side of Salisbury Street between Jones and Lane Streets, for the purpose of constructing thereon a sidetrack.

7. That the allegations of Paragraph Seven of the Bill of Complaint are denied, except that it is admitted that the Board of Aldermen of the City of Raleigh granted the Raleigh & Gaston R. R. Co., permission to occupy the sidewalk on the East side of Salisbury Street, between Jones and Lane Streets for the purpose of erecting a track; and it is specifically denied that the Board of Aldermen of the said City of Raleigh had the right under the then existing charter of said City to grant such permission for such use of said street.

8. That it is admitted that the Raleigh & Gaston R. R. Co. built a sidetrack on said Street as alleged in Paragraph Eight of the Bill of Complaint and except as herein admitted, the allegations of Paragraph Eight of the Bill of Complaint are denied.

9. That it is admitted that the sidetrack was laid on said Street, but except as herein admited, the allegations of Paragraph Nine of the Bill of Complaint are denied.

10. That it is admitted that the Raleigh & Gaston R. R. Co. has merged into the Seaboard Air Line Ry. Co., and that the said Seaboard Air Line Ry. Co. has succeeded to its rights and privileges, but it is denied that any right, privilege or franchise existed at the time of said merger, or at any other time prior to or since said merger, as to the use of the sidewalk in question.

11. That the allegations of Paragraph Eleven of the Bill of Complaint are admitted.

12. That the allegations of Paragraph Twelve of the Bill of Complaint are denied.

13. That the allegations of Paragraph Thirteen of the Bill of Complaint are denied.

14. That the allegations of Paragraph Fourteen of the Bill of Complaint are denied.

15. That the allegations of Paragraph Fifteen of the Bill of Complaint are denied.

16. That the allegations of Paragraph Sixteen of the Bill of Complaint are denied.

17. That the allegations of Paragraph Seventeen of the Bill of Complaint are denied; and it is specifically denied that Sub-section 6 of Section 29, of Chapter 138 of the acts of the General Assembly of 1871-'2 or Code Sections 1957 and 1982, or Revisal 1905 Sections 2566 and 2567 apply to or confer any authority, right or privilege upon the Raleigh & Gaston R. R. Co., or its successor.

18. That the allegations of Paragraph Eighteen of the Bill of Complaint are denied.

19. That the allegations of Paragraph Nineteen of the Bill of Complaint are denied.

20. That the allegations of Paragraph Twenty of the Bill of Complaint are denied.

Further answering the Bill of Complaint of the plaintiff the defendants say:

1. That the Board of Aldermen of the City of Raleigh did not have the power and authority to grant permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury St. between Jones St. and Lane St. without legislative authority.

2. That at the time the said side track was laid on Salisbury Street a cotton compress was being operated upon the lot adjacent to said side track and the same was built to afford shipping facilities to this compress, that said compress has not been used in many years and has been torn down and removed, and that for the past several years the Seaboard Air Line Railroad has continued to use the said side track for purposes of storing empty cars and of loading and unloading freight, thereby blocking
22 the street and depreciating and injuring the property on the West side of said Street and across from said side track.

3. That said side track is in the heart of the City of Raleigh and within one block of the Capitol Square, and just to the rear of the Supreme Court Library, which is upon the adioining block, that since the establishment of said sidewalk the City of Raleigh has more than doubled in population and the property adjacent to said side track and to the North of the same has greatly improved and grown, that the said Salisbury St. has been extended and widened to the North of said side track and at the present time the same is a nuisance to the citizens of Raleigh living to the North of said side track, who use Salisbury Street in going to and from the business part of the City of Raleigh.

4. That within the past two years, the Seaboard Air Line Railway, upon the site of the old cotton compress and immediately to the East of said sidetrack and 2 to 7 feet below the said side track, has erected a large and commodi-us freight warehouse with an approach to the same by wagons from the East on the side of the building opposite to said side track, with two tracks between the said depot and the East line of the sidewalk in question, and in addition thereto has constructed several team tracks to the North of said Freight warehouse affording ample facilities for loading and unloading freight. That the side track on Salisbury St. is not necessary to the proper conduct of the railroad of the *conduct of the* plaintiff and in fact is not used by it except on occasions for the unloading of freight, being more often used for the storing of empty freight cars.

5. That the Seaboard Air Line Railway has a side track adjacent to the side track in question, which could be used for loading and unloading freight, which it has never connected with its other lines.

Wherefore defendants and each of them pray that the in-
23 junction issued against them herein be dissolved; that the plaintiff be ordered to remove the side track from the sidewalk on Salisbury Street between Jones and Lane Streets and for such other and further relief as they may be entitled to.

JOHN W. HINSDALE, JR.
CHAS. U. HARRIS.
DOUGLAS & DOUGLAS.

NORTH CAROLINA,
Wake County:

James I. Johnson, being duly sworn, deposes and says, that the defendant herein, the City of Raleigh, is a municipal corporation and that he is its Mayor and Commissioner of Finance; that he has read the foregoing answer and that the same is true to his own knowledge, except as to matters therein stated upon information and belief and as to those matters he believes it to be true.

JAS. I. JOHNSON.

Subscribed and sworn to before me, this 10th day of Sept. A. D., 1913.

MILLIARD MIAL, *C. S. C.*

Filed Dec. 19th, 1913.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Agreed Facts.

It is agreed by the complainant and defendants to submit this matter upon the admissions in the pleadings, such statutes as the parties shall offer and as shall be admitted in evidence and the following facts:

1. That when the side track was constructed about the year 1881, it was used as a public track in connection with the cotton compress in the cotton season and was used for the purpose of loading and unloading freight for the public without additional compensation to the railroad for its use, and for any other purpose for which the railroad desired to use it. And that since the year 1906 the cotton compress has not been used, and since that time the said track has been used exclusively for loading and unloading freight, and storing empty cars.

2. That the minutes of the meeting of the Board of Aldermen of the city of Raleigh on August 6th, 1881, contained the following entry:

"Upon application of John C. Winder, Gen. Supt., the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the East side of Salisbury street, between Jones and Lane Streets, for the purpose of running a track."

3. That after the said action by the Board of Aldermen of the city of Raleigh, the Raleigh & Gaston Railroad Company built a track on said sidewalk and the said track has since its construction been used by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, as a public track for the delivery

and receipt of freight for intrastate and interstate transportation and it has been and is now used by the merchants of the City of Raleigh and by the public, and the said track on account of its location is convenienct for the purpose for which it is used.

4. That the said track has been maintained and operated by the Raleigh & Gaston Railroad Company and Seaboard Air Line Railway since 1881, and the construction and use of said track has been known to and permitted by the officers and representatives of the City of Raleigh, prior to the — day of May, 1911, when the Board of Aldermen ordered the removal of said track.

5. That the right to maintain said track as it is now placed on Salisbury Street and use it for the purpose of loading and unloading freight is of a value to the Seaboard Air Line Railway exceeding $3,000.00 exclusive of interest and costs.

6. That the Seaboard Air Line Railway is the sole owner and occupant of the block in the city of Raleigh bounded on the West by Salisbury Street, on the North by Lane Street, on the East by Halifax Street and on the South by Jones Street, and is the sole owner and occupant of the block in the city of Raleigh next adjoining to said block and to the North thereof, bounded as follows: On the west by Salisbury Street, on the North by North Street, on the East by Halifax Street and on the South by Lane Street, and the two blocks are used by the Seaboard Air Line Railway for the purpose of its business exclusively.

26 7. That Salisbury Street is 43 feet in width from curb to curb at the point at which this track is located, and in addition thereto a sidewalk is located on the West side of said street, 13 feet in width, and the part of the sidewalk on the East occupied by this track is 10 feet, and the width of the street and the sidewalk on the West side are available for public use and are used by the public.

8. That in constructing a new freight station, about two years ago, it was necessary for the Seaboard Air Line Railway to make an excavation at the corner of Jones and Salisbury Streets, of about 8 feet, the said excavation extending to the North along Salisbury Street, and the tracks constructed in connection with said freight station are in this excavation and the freight station is between these tracks and Halifax Street and they cannot be used as team tracks and the other team tracks of the Seaboard Air Line Railway are on Lane Street which is one block North of Jones Street, a distance of 420 feet, and the said tract on Salisbury Street extends from Jones Street to Lane Street.

9. That the southern end of the said track on Salisbury Street is one block North of the state capitol, a distance of 420 feet.

10. That with the track where it is there is no sidewalk on the East side of Salisbury Street between Jones Street and Lane Street for use by pedestrians.

JAMES H. POU,
MURRAY ALLEN,
Attorneys for Complainant.
J. W. HINSDALE, JR.,
CHAS. U. HARRIS,
DOUGLASS & DOUGLASS,
Attorneys for Defendants.

27 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Additional Facts Agreed.

In the above entitled cause it was agreed at the hearing that the following should be added to the facts agreed:

It is agreed by counsel for the complainant and defendants that the charter of the City of Raleigh was revised and consolidated in Chapter 98 of the Private Acts of 1856 and 1857, Section 58, of which is as follows: and which was in force Aug. 5, 1881:

"That the Commissioners shall cause to be kept clean and in good repair streets, sidewalks and alleys. They may establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them".

That in the charter of the City of Raleigh now in force, Article V, Section 1, the Commissioners of the City of Raleigh are given power:

"To direct, control and prohibit the laying of railroad tracks, turnouts, and switches in the streets, avenues, and alleys of the city, unless the same shall have been authorized by ordinance, and to require that all railroads, turnouts, and switches shall be constructed as not to interfere with the drainage of the city and with the ordinary travel and use of the streets, avenues, and alleys in said city, and to construct and keep in repair suitable crossings, at the intersection of streets, avenues and alleys, and ditches, sewers, and culverts where the board of commissioners shall deem it necessary.

H. G. CONNOR,
Judge of the District Court of the United States for the Eastern District of North Carolina.

JOHN W. HINSDALE, JR.,
Counsel for Complainant.
MURRAY ALLEN,
Counsel for Defendant.

28 Filed December 15th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RY. CO., Plaintiff,
vs.
THE CITY OF RALEIGH and Others, Defendants.

Bill filed by plaintiff seeking an injunction restraining the City of Raleigh and the individual defendants, Commissioners, from enforcing an ordinance requiring plaintiff to remove its track from the side walk, being a part of Salisbury Street, Raleigh, N. C.

Murray Allen, James H. Pou, of Raleigh, N. C., for Plaintiff.
John W. Hinsdale, Jr., Charles U. Harris, Douglas & Douglas, of Raleigh, N. C., for Defendants.

CONNOR, *District Judge:*

The cause was submitted upon the bill, answer, and statement of facts agreed upon by the parties. Plaintiff is a Virginia Corporation and successor to the property, rights and franchises of the
29 Raleigh & Gaston Railroad Company, chartered by the General Assembly of North Carolina, at its Session of 1835. The City of Raleigh was the Southern terminus of said railroad. Pursuant to the provisions of the charter, the said company constructed a track from Gaston, N. C., to Raleigh, N. C. and constructed terminals and depots, in said city, for the receipt and delivery of freight and passengers, including a freight depot and a warehouse on Halifax Street between Lane and North Streets, extending from Halifax Street to Salisbury Street, extending its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury Street into said depot and warehouse. During the year 1881, a cotton compress was constructed on a lot in the City of Raleigh, bounded by Salisbury, Jones, Halifax and Lane Streets and, for the purpose of delivering to, and receiving cotton from said warehouse, and to serve the patrons of the said Rail Road Company, and to furnish the public facilities for the delivery of cotton in car load lots, and to better perform its functions as a common carrier, the Raleigh & Gaston Rail Road Company made application to the Board of Aldermen of Raleigh for the grant of the right, privilege or franchise, to occupy the side walk on the East side of Salisbury Street between Jones and Lane Streets for the purpose of constructing a track thereon. Said Board of Aldermen on August 5, 1871, adopted the following resolution, or ordinance:

"Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the side walk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

When the track was constructed, pursuant to the permission granted by said ordinance, it was used as a public track in connection with the cotton compress in the cotton season, and was used for the purpose of loading and unloading freight for the
30 public, without additional compensation to the railroad for its use, and for any other purpose for which the railroad company desired to use it. Since the year 1906, the cotton compress has not been used. Since that date the said track has been used exclusively for loading and unloading freight and storing empty cars engaged in inter and intrastate traffic. It has been, and is now, used by the merchants of the city of Raleigh and by the public and on account of its location, is convenient for the said purpose. The right to maintain said track, as it is now placed and used on Salisbury Street, is of value to plaintiff, exceeding $3,000.00, exclusive of cost herein.

The track has been maintained and operated by the Raleigh & Gaston Railroad Company and the plaintiff, its successor, since 1881, with the knowledge and permission of the officers and representatives of the City of Raleigh. The plaintiff is the sole owner and occupant of the block of land, in said city bounded on the west by Salisbury Street, on the North by Lane Street, on the East by Halifax Street and on the South by Jones Street, and is the sole owner and occupant of the block in said City next adjacent to said block and to the north thereof, bounded on the west by Salisbury Street, on the north by North Street, on the east by Halifax Street and on the south by Lane Street. The two blocks are used by the plaintiff for the purpose of conducting its business exclusively. Salisbury Street is 43 feet wide between curbs at that point at which the track is located on the side walk and, in addition thereto, there is located a side walk on the west side of the street 13 feet wide, the portion of the side walk on the east side of the Street occupied by plaintiff's track, is 10 feet wide; the street and the side walk on the west side thereof, are available to, and are used by the public. In con-
31 structing a new freight station two years ago, it was necessary for the Seaboard Air Line Ry. Company to make an excavation at the corner of Jones and Salisbury Streets of about 8 feet, extending northwards along Salisbury Street, the tracks constructed in connection with said freight station are in this excavation and the freight station is between these tracks and Halifax street. They can not be used as team tracks, and the other team tracks of plaintiff, which are on Lane Street, which is one block north of Jones Street, a distance of 420 feet; the said track on Salisbury Street extends from Jones Street to Lane Street. The Southern end of the track on Salisbury Street is one block north of the State Capitol, a distance of 420 feet. With the track as it is now laid and used, there is no side walk on the east side of Salisbury Street, between Jones and Lane Streets, for use by pedestrians. Within the two years last past plaintiff has built on the site upon which the compress stood, and immediately to the east of said side track, a commodious freight warehouse, with an approach to the same by wagons from the east and the side of the building opposite said side track with two tracks

between said depot, and the east line of the side walk in questio and, in addition thereto, has constructed several team tracks to th north of said warehouse.

At their meeting, on June 10, 1903, the defendants, Commissione of the City of Raleigh, after hearing the matter, and against th protest of plaintiff, adopted a resolution ordering the removal of th track constructed and maintained by plaintiff on the side walk, o the east side of Salisbury Street, between Jones and Lane Street being the track described in the resolution, or ordinance of Augu 5, 1881. By said resolution, the Commissioner of Public Works
the City of Raleigh was directed if plaintiff failed to do s
32 to remove the said track. Certain Private Laws are set ou or referred to, in the Bill and are to be considered as in ev dence. A preliminary injunction was issued and the cause hea upon the prayer for a permanent injunction restraining defendan from removing said track, or otherwise enforcing said resolution ordinance of June 10, 1913. It is conceded that the plaintiff is e titled, by succession, to such rights, privileges and franchises vested in the Raleigh & Gaston Railroad Company by virtue of i charter, and amendments thereto, and the ordinance of August 1881, or which it may, upon the facts herein set out, have otherwi acquired. While it is settled by abundant authority, that Courts Equity will not, save in exceptional cases, enjoin the enforcement, execution of the criminal law, or of city ordinances imposing fin and penalties for their violation, it is also settled that, where righ of property are involved, and the enforcement of such ordinance violate vested rights, injunctive relief will be awarded, especial where such enforcement will work irreparable injury. In Owen boro vs. Cumberland Telephone Co., 230 U. S. 58, the Court e joined the enforcement of an ordinance revoking a grant of a fra chise to occupy the streets of a city. The power of the court to enjoi the enforcement of an ordinance regarding railroad tracks in street was recognized in A. C. L. R. R. Co. vs. Goldsboro, 232 U. S., 54 The refusal on the part of the defendant to obey the ordinance su jects it to indictment for a misdemeanor (Rev. 3702). If no oth mode of enforcement was prescribed by the ordinance, the Cou would find no authority for interfering. The validity of the resol tion, or ordinance, could be tested by way of defence to an indic ment. It is conceded that defendant's officer, unless restrained, wi proceed summarily to remove the track. If plaintiff's contentio upon the merits of the controversy, are sustained, it would see that its right should be protected by injunction. It is co
33 ceded that plaintiff is a public utility corporation and suc right as it has acquired to occupy the side walk is used in th prosecution of its business as a common carrier. The Charter of th City of Raleigh, at the date of the ordinance, of August 5th, 188 and since that time, confers upon its Commissioners power to ke clean, and in good repair, the streets side walks and alleys, to esta lish the width and ascertain the location of those already provide and lay out and open others and may reduce the width of all them. It may be conceded that this language confers upon th

governing Board the usual powers granted to municipal authorities in regard to the use of the streets—including the power to grant to quasi public corporations, such as the plaintiff, the right to a reasonable use of the public streets, not inconsistent with the right of the public. Griffin vs. R. R., 150 N. C. 312. It may be further conceded that, when such right of user is granted, within the power of such authorities, and such grant is accepted and acted upon, a property right vests in the grantee of which is may not be deprived, otherwise than by due process of law. Owensboro vs. Cumberland Telephone Co., supra, where these propositions are decided and the authorities cited. Notwithstanding these concessions two questions remain open for decision. Did the ordinance of 1881 construed in the light of then existing conditions, and the reasons inducing its passage, grant to plaintiff's predecessor in title, a right to be enjoyed in perpetuity to appropriate to its use, by locating and maintaining a track thereon, to the exclusion of all others, the side walk for any and all purposes, connected with the operation of its freight traffic, and if so, was such grant within the power of the Board of Commissioners to make. Mr. Justice Lurton, in the Cumberland Telephone Company case, supra, says: "The grant, by ordinance, to an incorporated telephone company, its successors and assigns, of the
34 right to occupy the streets and alleys of a city, with its poles, and wires, for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant."

The power to grant a reasonable use of the streets of Raleigh to a public utility corporation, is sustained in Moore vs. Power Co., 163 N. C. 300. The title to the soil in the streets of the city is in the State, but the power to subject them to the use of the municipality and its inhabitants, is in its governing board, supra. It is a well settled rule of construction, applied to grants of public property, which has been applied to grants of the use of streets that, "Where special street privileges and franchises are granted, which interfere with the authority of the municipality to control its streets and with free use thereof by the public, the grant must be construed strictly in favor of the public and against the grantee." 27 Am. & Eng. Enc. 154. The soundness, if not necessity, for this salutary rule, is manifest. The resolution, or ordinance, does not use appropriate or usual, words found in grants, as distinguished from a license. In the Cumberland Telephone Co. case, supra, the right to erect and maintain poles and wires is "granted". So in Pike's Peak Power Co. vs. Colorado Springs, 105 Fed. 1, the right to use the streets for the purpose of stringing wires was "granted" to the Company. In construing the language of the ordinance of 1881, for the purpose of ascertaining the intention of the parties, the purpose for which the permission to occupy the side walk was given should be kept in view. A cotton compress had recently been erected on the Raleigh & Gaston R. R. Company. It is proper to take no-

tice of the fact that in moving bales of cotton either to or
35 from the compress, the distance and physical conditions, are of essential importance in regard to cost and convenience in operating the compress. Again, as is well known, the compress would ordinarily be operated only a portion—not exceeding one third of the year. The cost of laying a spur, or side track for the distance required, on the side walk was, as compared with its value, small. It is doubtful whether the considerations which induced the Commissioners to give to the Raleigh & Gaston Railroad Company permission to occupy, by laying its track over the side walk, for the purpose of enabling it to successfully operate the compress would have been sufficient to move them to make a grant of a franchise to do so, for all purposes, in perpetuity. Certainly the terms used, so appropriate to confer a temporary, revocable, license, and so inappropriate to vest, by grant, a perpetual and exclusive use of the side walk, are sufficient to raise, in the mind, a reasonable doubt as to the intention of the parties which, upon the principle uniformly applied in such cases, should be solved in favor of the public for whose use the property in the soil was held. Minturn vs. Larue, 23 How. 435. The principle is clearly stated by Mr. Justice Clifford, in Holyoke Co. vs. Lyman, 15 How. 500 (512): "Wherever privileges are granted to a corporation, and the grant comes under revision in the Court, such privileges are to be strictly construed against the corporation and in favor of the public and nothing passes but what is granted in clear and explicit terms".

The language of the Court in Water Company vs. Knoxville, 200 U. S. 22, strongly states the principle and expressly applies it to city ordinances affecting the rights of the public in streets. Mr. Justice Harlan, after citing many cases, says: "It is true that the cases to which we have referred involved, in the main, the construc-
36 tion of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect to matters which concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by implication. If, by contract, or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words, so clear as not to admit of two different or inconsistent meanings." It will be observed that in Owensboro vs. Cumberland Telephone Company, supra, relied upon by plaintiff, the language of the ordinance, under which the corporation claimed the franchise, is free from ambiguity. The Telephone Company was "granted the right to erect and maintain its poles in the streets." It is also provided that "nothing in the ordinances should be construed as an exclusive right to said company to erect poles, etc.," and, by Section 4 of the ordinance, certain duties and obligations are assumed by the corporation, constituting a valuable consideration, enuring to the benefit of the citizens of the city for the grant of the franchise—thus giving to the ordinance a contractual character, within the power of the Commissioner to make. It will be also noted that Judge Lurton, in sus-

taining the ordinance says: "Nor did it undertake to grant an exclusive right. Express power to grant an exclusive right has generally been held essential." He says that, as the grant was not exclusive the Court was not called upon to deal with that question.

If it be conceded that, by the ordinance of August 5th, 1881, the Commissioners undertook to grant to the Raleigh & Gaston Railroad Company, and its successors, the exclusive right, in perpetuity, to occupy and maintain a track, for all such purposes as it, or they deemed proper in the prosecution of their business as common
37 carriers, the side walk on the eastern side of Salisbury Street, the question is presented whether they were vested, by the charter of the city, which constituted the grant of legislative authority in that respect, with the power to do so. Conceding that the power granted the Commissioners, in regard to the use of the streets, includes the power to "regulate" such use, and giving to this language the interpretation given it in Cumberland Telephone Company case, supra, and in Moore vs. Power Company, supra, the question is yet open, whether the power claimed by plaintiff is conferred. In State vs. R. R., 141 N. C. 736 (53 S. E. 290), the Supremen Court of this State held: "In absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street can not be construed as a grant of a permanent easement." After citing authorities, it is said: "The general rule to be extracted from the authorities is that the legislative power vested in mjnicipal bodies, is something which can not be bartered away in such manner as to disable them from the performance of their public functions." While the Supreme Court of this State has, in a number of cases, sustained the power of the Commissioners, or other governing body of municipalities, to grant to public service corporations the right to place their tracks, poles, wires, pipes, etc., in, under and along the public streets, no case has been found in which the power has been claimed to grant an exclusive and perpetual use of a street, or side walk, to such corporations. Griffin vs. R. R., 150 N. C. 312, relied on by plaintiff, falls *for* short of sustaining such power. There, the Commissioners granted the right to the defendant to lay its track along the street—there is no suggestion that the track occupied the entire street, to the exclusion of pedestrains, or per-
38 sons passing in vehicles. The plaintiff, as an abutting owner, sought to enjoin the defendant from exercising the privilege granted. For manifest reasons, and upon well settled principles, the Court refused to grant the injunction. The grounds upon which that, and the cases cited in the opinion of the Chief Justice, are based, are not applicable here. That the occupation of the side walk by plaintiff's track excludes all other persons from passing over the side walk, otherwise than by walking over the track, when not appropriated by plaintiff's freight cars, is conceded. The extent of the claim asserted by plaintiff, for all practical purposes, vests in it the absolute and exclusive use of the side walk. This claim is based upon an ordinance adopted by the Commissioners giving "permission" to its predecessor in title, to occupy the side walk, without

any limitation in respect to time, and without any valuable consideration, to support a contract, or the use of any contractual language. The permission was given to meet a condition, and promote a purpose, temporary in character, which has ceased to exist. If plaintiff's contention is sustained, the entire side walk, for 420 feet on one of the principal streets of the capital city of the State, in a short distance of the State House and other public buildings, extending from Jones to Lane Streets, is appropriated to the exclusive use of the plaintiff. The claim is based upon the language of an ordinance adopted thirty years ago, to meet a temporary condition, during which time the city has increased very greatly in population. The claim invites careful consideration and its successful maintenance demands strong reasons, or controlling authority. Giving to the numerous decided cases, and the language used by the Courts, due weight, in the light of the facts upon which they are based, I am constrained to reach the conclusion, that by a fair construction, the ordinance of August 5, 1881, interpreted in the
39 light of the condition under which it was used, and the purpose which the parties had in view, does not vest in the plaintiff the property right in the use of the side walk for which it contends, and that, if such construction is permissible, the Commissioners were not vested by the legislature with power to make such exclusive, perpetual grant of the side walk to the Raleigh & Gaston Rail Road Company, which prevents the present governing Board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the side walk for the benefit of the public, from making and enforcing the ordinance of June 10, 1913. Plaintiff relies upon the provisions of the State Statute in force at the date of the ordinance of 1881, giving to all railroad companies the right to construct their tracks across, along or upon any street * * * which the route of their road shall intersect or touch "provided the company shall restore the street, thus intersected, or touched, to its former state, or, to such state as not unnecessarily to have impaired its usefulness." Rev. 2567. Conceding, for the reasons assigned, pro hac vice, that the plaintiff has the rights and privileges conferred by this Section, free from the limitation in regard to "the assent of the corporation", it is confronted with the duty imposed by the statute to restore the * * * thus intersected or touched to its former state, etc. It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The side walk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road "across, along, or upon" a street, always of much greater width than a rail road track, and the cross ties, as a grant of the right to occupy the entire street or side walk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible
40 to *to* restore the street to "its former state", if the track occupies its entire width. Statutes must be given a reasonable construction.

Plaintiff further contends that, by reason of the long time elapsing

since the occupation of the side walk, with the knowledge and acquiescence of the defendants, they are estopped from asserting a claim to the use of the side walk, for the use of the public, and for this contention quotes the language of Judge Dillon: "If the municipality has the power to grant such right, or franchise, and a corporation believing and assuming that it has the consent or grant of the municipality, has with the knowledge of the proper municipal authorities, proceeded to exercise the right, or franchise, and has constructed, maintained and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers, and representatives in knowingly permitting and acquiescing in the use and occupation of the streets from asserting the invalidity of the grant of the franchise, at least so far as its failure to pass *on* ordinance, or take the steps necessary to effectuate the grant." Mun. Corp. 1242. The difficulty with which plaintiff is met, in invoking the principle thus announced, is found in the absence of the power in the corporation to grant the alleged right or franchise. If the power existed, the right is granted—if it did not exist, the plaintiff has, at all times, maintained a nuisance by an unlawful obstruction of the side walk and it is clear that the municipality is never estopped from abating a public nuisance. Construing the ordinance of August 5, 1881, as a revocable license, the plaintiff lawfully occupied the side walk until such license was revoked and of course no estoppel can accrue, under this view. Plaintiff, in another form, asserts the right to continue the occupation of the side walk by averring that, by reason of the lapse of time since the passing of the ordinance, a grant will be presumed. This,
41 under our statutory system, by which title is acquired by lapse of time, is but a plea of the statute of limitations, and is met by the language of the Court in Turner vs. Commrs., 127 N. C. 153. "As to streets * * * and other property which the city may hold in trust for the public, without power to alternate, it is true that no statute of limitations can run." Moose vs. Carson, 104 N. C., 431, Rev. 389. The occupation of the side walk, under the license was not adverse until the passage of the ordinance of June 10, 1913. To the suggestion that the occupation of the side walk on the eastern side of Salisbury Street, does not unnecessarily impair the usefulness of the Street, because there is a space of 43 feet between curbs, and 13 feet side walk on the western side walk, it is sufficient to say that the control of the streets, in these respects, is committed to the Board of Commissioners of the City and not to the Courts. If the Board has the power to pass the ordinance of June 10, 1913, requiring the plaintiff to remove the track from the side walk, it is *neither* the province, nor within the power of the Court to question its wisdom, or propriety. It may not be improper, however, to say that, in the light of the facts agreed upon and physical conditions of which it is impossible to be ignorant, and the contention seriously made, and ably pressed, by plaintiff, the wisdom of the action of the Commissioners for the preservation of the rights of the public committed to their care, is very manifest. The questions presented and argued are, in many respects, of first impression in this State, and their cor-

rect solution of much interest to the public and public service corporations, whose business requires the use of the public streets. I concur in the opinion of the Supreme Court that "The City clearly possesses the statutory right to assent to the use of the street by the railroad company. This is often a most essential power, necessary to be used for the benefit of the people of the city."

42 I am further of the opinion that, in the absence of an express legislative grant, the terms of which are free from doubt or ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or side walk to be enjoyed in perpetuity. Such power was not granted to the Board of Commissioners of the City of Raleigh by the charter existing at the time the resolution, or ordinance, giving permission to the Raleigh & Gaston Rail Road Company to occupy the side walk on Salisbury Street was adopted, August 5th, 1881.

The only relief sought being injunctive, the plaintiff's Bill will be dismissed and the defendants will recover their cost.

H. G. CONNOR,
United States District Judge.

December 11, 1914.

43 Filed December 15, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of the City of Raleigh, Defendants.

Final Decree.

This cause coming on to be heard upon the bill of complaint, answer and statement of facts agreed upon by the parties, and being heard, and it appearing to the Court that the only relief sought is injunctive and the Court being of opinion that the complainant is not entitled to such relief,

Now, therefore, it is ordered, adjudged and decreed that the bill of complaint be dismissed and the costs of this suit be paid by the complainant.

H. G. CONNOR,
Judge of the District Court of the United States for the Eastern District of North Carolina.

44 Filed Dec. 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Bill of Exceptions.

To the decree rendered by the Court the complainant, Seaboard Air Line Railway, in due form and in apt time and in full compliance with the rules in that respect of the said District Court excepted and tendered this, its bill of exception-, and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

H. G. CONNOR, *Judge.* [SEAL.]

To the decree rendered by the Court the complainant, Seaboard Air Line Railway, in due form and in apt time and in full compliance with the rules in that respect of the said District Court excepted upon the following grounds, to-wit:

1. Because the United States District Court for the Eastern District of North Carolina erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the ordinance of the City of Raleigh ordering the removal of the track of the complainant from the street and sidewalk on the east side of north Salisbury Street in the City
45 of Raleigh between Jones and Lane Streets, will impair the obligation of a valid and binding contract between the City of Raleigh and the complainant in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

2. Because the said Court erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article II, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

3. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for

that by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company, predecessor of complainant, had the power, with the assent of the municipal authorities of the City of Raleigh to occupy the sidewalk on the east side of north Salisbury Street between Jones and Lane Streets in the City of Raleigh, for the purpose of running a track thereon, the said power being specifically granted by the acts of the General Assembly of North Carolina, Session 1871-2, Chapter 38, Section 29, Subsection 6, as brought forward and amended by the Code, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) to construct their road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal, which the route of its road shall intersect or touch, but the company shall re-
46 store the stream or water course, street, highway, plank road and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be construed to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by stream or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That the said track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the said acts of the General Assembly of North Carolina, with the assent of the City of Raleigh, and the enforcement of the ordinance enacted by the Commissioners of the City of Raleigh ordering the removal of said track will impair the obligation of the contract thereby created in violation of Section 10, Article 1 of the Constitution of the United States, the provisions of which article and section were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

4. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that the lapse of time, more than 31 years during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company and its successor and assign, Seaboard Air Line Railway, complainant in this suit, the right to retain said track which right constitutes a contract, subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of said ordinance ordering the removal of said track will result in impairing the obligations of said contract in violation of the said provisions of the Constitution of the United States, the protec-
47 tion and benefit of which said Article and Section of the Constitution, the complainant expressly set up and relied upon.

5. Because the said Court erred in dismissing the bill of com-

plaint and in denying the complainant the injunctive relief prayed for, for that it appears from the admissions in the pleadings and the facts agreed that said track was placed in Salisbury Street and has remained there under and by virtue of a contract, the obligations of which will be impaired by the enforcement of the ordinance ordering its removal, in violation of Section 10, Article 1, of the Constitution of the United States, which Section and Article were expressly set up and relied upon by the complainant.

6. Because the Court erred in holding that the complainant's claim is based upon the language of an ordinance adopted thirty years ago to meet a temporary condition, for that it appears from the admissions in the pleadings and the facts agreed that the track was constructed for a permanent purpose, that when the track was constructed pursuant to the permission granted in the ordinance of the City of Raleigh, adopted August 5, 1881, it was used as a public track in connection with the cotton compress of complainant in the cotton season and was used for the purpose of loading and unloading freight for the public and for any other purpose for which the railroad company desired to use it.

7. Because the Court erred in holding that the ordinance of the City of Raleigh of August 5, 1881, does not vest in complainant the property right in the use of said side walk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the legislature with the power to make such exclusive, perpetual grant of the sidewalk to the Raleigh & Gaston Railroad Company, which prevents the present governing board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the sidewalks for the benefit of the public from making and enforcing the ordinance of June 10, 1913,

48 for that the ordinance of August 5, 1881, granted permission to occupy the sidewalk for general railroad purposes in perpetuity and the acceptance of the grant and the expense incurred in the construction of the said track created a valid and binding contract between the City of Raleigh and the Raleigh & Gaston Railroad and its successor, Seaboard Air Line Railway, to maintain its track in the said street in perpetuity, and for that the right to construct and maintain its tracks in the streets of the City of Raleigh was given the Raleigh & Gaston Railroad Company by the act of the legislature of North Carolina, with the assent of the City of Raleigh, and such assent was given by the ordinance of August 5, 1881, and by acquiescence in the occupancy of the sidewalk by the track for all purposes by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, and for that by the acquiescence of the City of Raleigh for more than thirty-one years in the use of said sidewalk by the Raleigh & Gaston Railroad and by its successor, Seaboard Air Line Railway, has created the right to retain said track, which right constitutes a contract and it is not within the power of the governing board of the City of Raleigh to order the removal of the said track, because to do so would impair the obligations of the contract of complainant in violation of the Con-

stitution of the United States, Section 10, Article 1, which was specially set up and relied upon by complainant.

8. Because the said Court erred in holding that the right to occupy the street was not given by the act of the legislature of North Carolina because said act provided that the street occupied by a track must be restored to its former state, for that the statute provides that the company shall restore the street to its former state or to such state as not unnecessarily to have impaired its usefulness, and the said street has been restored to such state as not unnecessarily to have impaired its usefulness, and the portion of the street occupied was expressly designated by the ordinance of Aug. 5, 1881, and such portion of the street has been continuously occupied since the time for general railroad purposes with the knowledge and consent of
49 the municipal authorities until the ordinance of June 10, 1913, was adopted. The facts agreed show that Salisbury Street is 43 feet in width at this point, that there is located on the west side a sidewalk 13 feet in width, and the portion of the sidewalk on the east side occupied by the complainant's track is 10 feet wide, and that the street and the sidewalk on the west side thereof are available to and are used by the public. It further appears that complainant is the sole abutting property owner along the east side of Salisbury Street for the entire length of said track.

9. Because the said Court erred in holding that the City of Raleigh is not estopped to deny that it has given its assent to the occupation of Salisbury Street by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, for that the railroad companies having the right to occupy the street with the assent of the City of Raleigh, and with the knowledge of the proper municipal authorities having proceeded to exercise the right and having constructed, maintained and operated its track in Salisbury Street for general railroad purposes, the City of Raleigh is estopped from asserting that it has not given its assent to such use of the street.

10. Because the Court erred in holding that the assent of the City of Raleigh to the occupancy of said street will not be presumed after the lapse of so many years, and in holding that under the statutory system of North Carolina, this is but a plea of the statute of limitations, for that, as the complainant contended, the assent of the City of Raleigh would be presumed by reason of the occupancy of the street by the railroad for a long period of years for general railroad purposes under such circumstances as to amount to a claim of the right to so occupy it, and for that the City of Raleigh having power to grant the right to occupy the street, such grant is presumed where the right has been exercised for a period of more than twenty years.

11. Because the said Court erred in holding that the ques-
50 tion of whether the usefulness of Salisbury Street is unnecessarily impaired is for determination by the commissioners of the City of Raleigh, and that the wisdom of their action is manifest, for that, it is for the Court to say whether the usefulness of the street is not unnecessarily impaired.

12. Because the Court erred in holding that in the absence of express legislative grant, the terms of which are free from doubt and

ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity and that said power was not granted to the commissioners of the city of Raleigh by the charter existing at the time of the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad Company to occupy the sid-walk on Salisbury Street was adopted, August 5th, 1881.

13. Because the decree of the Court is against the law and equity of the case and against the admission and facts agreed.

14. Because in the admissions in the pleadings and the facts agreed, the complainant was entitled to injunctive relief against the enforcement of the ordinance of the city of Raleigh of June 10, 1913, as prayed for in the bill of complaint.

And the complainant tendered the foregoing its bill of exception and asked that it be allowed, signed and sealed, and it is allowed, signed and sealed accordingly.

H. G. CONNOR, *Judge.* [SEAL.]

And now in furtherance of justice and in order that right may be done, the complain-t tenders and presents the foregoing as its bill of exceptions to the decree of the Court in this case, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record.

JAMES H. POU,
MURRAY ALLEN,
Counsel for Complainant.

51 Settled, allowed, signed and sealed, this 26th day of December, 1914.

H. G. CONNOR, *Judge.* [SEAL.]

Service Accepted.

Service accepted with copy, this 29th day of December, 1914.

JOHN W. HINSDALE, JR.,
Attorney for Defendants.

52 Filed Dec. 29, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh.

Petition for Appeal.

To the Honorable H. G. Connor, District Judge:

The above named Seaboard Air Line Railway, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 15th day of December, A. D., 1914, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents, upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of him be made.

JAMES H. POU,
MURRAY ALLEN,
Counsel for Seaboard Air Line Railway, Appellant.

53 Filed December 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Order Allowing Appeal.

On motion of Murray Allen, Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of

the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of $1,000.00 the same to act as a supersedeas bond also as a bond for costs and damages on appeal.

Dated December 26th, 1914.

H. G. CONNOR,
District Judge of the District Court of the United States for the Eastern District of North Carolina.

54 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RY., Complainant,
vs.
CITY OF RALEIGH, JAMES I. JOHNSON, etc., Defendants.

Order Restoring Injunction During the Pendency of Appeal.

This cause coming on to be heard this 26th day of December, 1914, upon the application of the Seaboard Air Line Ry. for an appeal to the Supreme Court of the United States, and said appeal having been allowed, it is ordered that the injunction issued in this cause enjoining and restraining the city of Raleigh, James I. Johnson, Mayor and Commissioner, O. G. King and R. B. Seawell, Commissioners of the city of Raleigh from putting into effect an ordinance adopted on the 10th day of June, 1913, relative to the removal of the side track of the Seaboard Air Line Ry., appellant, on the Eastern side of north Salisbury Street, between Jones and Lane Streets in the city of Raleigh, N. C., be restored during the pendency of the appeal, upon the said Seaboard Air Line Ry., appellant, giving bond in the sum of $1,000.00 and the Clerk, upon the giving of the said bond, is directed to stay the mandate of this court until further order.

It is further ordered that, upon the giving of said bond, the City of Raleigh, and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, defendants herein, their agents and servants and all persons claiming to act under their authority, direction or control, be and they are hereby specially restrained and enjoined from attempting to enforce the ordinance of
55 the City of Raleigh, adopted June 10th, 1913, directing the removal of the track of the complainant, Seaboard Air Line Railway, from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Street in the city of Raleigh, and they are hereby specially restrained and enjoined from removing or attempting to remove said track, and from in any manner hindering or obstructing the Seaboard Air Line Railway, or its agents, servants or employees in the use of said track during the pendency of said appeal.

H. G. CONNOR,
Judge of the District Court of the United States for the Eastern District of North Carolina.

56 Filed December 29, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Assignment of Errors.

The Seaboard Air Line Railway, appellant in the above entitled cause, in connection with its petition for appeal, herein presents and files therewith its assignment of errors, as to which matters and things it says that the decree entered herein on the 15th day of December, 1914, is erroneous, to-wit:

1. Because the United States District Court for the Eastern District of North Carolina erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the ordinance of the City of Raleigh, ordering the removal of the track of the complainant from the street and sidewalk on the east side of north Salisbury Street in the City of Raleigh between Jones and Lane Streets, will impair the obligation of a valid and binding contract between the City of Raleigh and the complainant in violation of Section 10, Article 1, of the Con-
57 stitution of the United States, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

2. Because the said Court erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article II, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

3. Because the said Court erred in dismissing the bill of complaint and in denying the complain-t the injunctive relief prayed for, for that by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company, predecessor of complainant, had the power, with the assent of the municipal authorities of the City of Raleigh to occupy the sidewalk on the east side of north Salisbury Street between Jones and Lane Streets in the City of Raleigh, for the purpose of running a track thereon, the said power being specifically granted by the acts of the General

Assembly of North Carolina, Session of 1871-2, Chapter 38, Section 29, Sub-section 6, as brought forward and amended by The Code, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) to construct their road across, along or upon any stream of water, water course, street, highway, plankroad, turnpike, or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plankroad and turnpike road thus intersected or touched to its former state or to such
58 state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be construed to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That the said track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the said acts of the General Assembly of North Carolina, with the assent of the City of Raleigh, and the enforcement of the ordinance enacted by the Commissioners of the City of Raleigh ordering the removal of said track will impair the obligation of the contract thereby created in violation of Section 10, Article 1, of the Constitution of the United States, the provisions of which article and section were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

4. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief praved for, for that the lapse of time, more than 31 years during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company and its successor and assign, Seaboard Air Line Railway, complainant in this suit, the right to retain said track which right constitutes a *construct*, subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of said ordinance ordering the removal of said track will result in impairing the obligations of said contract in violation of the said pro-
59 visions of the Constitution of the United States, the protection and benefit of which said Article and Section of the Constitution, the complainant expressly set up and relied upon.

5. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief praved for, for that it appears from the admissions in the pleadings and the facts agreed that said track was placed in Salisbury Street and has remained there under and by virtue of a contract, the obligations of which will be impaired by the enforcement of the ordinance ordering its removal, in violation of Section 10, Article 1, of the Constitution of the United States, which section and Article were expressly set up and relied upon by the complainant.

6. Because the Court erred in holding that the complainant's claim is based upon the language of an ordinance adopted thirty years ago to meet a temporary condition, for that it appears from the admissions in the pleadings and the facts agreed that the track was constructed for a permanent purpose, that when the track was constructed pursuant to the permission granted in the ordinance of the City of Raleigh, adopted August 5, 1881, it was used as a public track in connection with the cotton compress of complainant in the cotton season and was used for the purpose of loading and unloading freight for the public and for any other purposes for which the railroad company desired to use it.

7. Because the Court erred in holding that the ordinance of the City of Raleigh of August 5, 1881, does not vest in complainant the property right in the use of said sidewalk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the legislature with the power to make such exclusive, perpetual grant of the sidewalk to the Raleigh & Gaston Railroad Company, which prevents the present gov-
60 erning board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the sidewalks for the benefit of the public from making and enforcing the ordinance of June 10, 1913, for that the ordinance of August 5, 1881, granted permission to occupy the sidewalk for general railroad purposes in perpetuity and the acceptance of the grant and the expense incurred in the construction of the said track created a valid and binding contract between the City of Raleigh and the Raleigh & Gaston Railroad and its successor, Seaboard Air Line Railway, to maintain its track in the said street in perpetuity, and for that the right to construct and maintain its tracks in the streets of the City of Raleigh was given the Raleigh & Gaston Railroad Company by the act of the legislature of North Carolina, with the assent of the City of Raleigh, and such assent was given by the ordinance of August 5, 1881, and by acquiescence in the occupancy of the sidewalk by the track for all purposes by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, and for that by the acquiescence of the City of Raleigh for more than thirty-one years in the use of said sidewalk by the Raleigh & Gaston Railroad and by its successor, Seaboard Air Line Railway, has created the right to retain said track, which right constitutes a contract and it is not within the power of the governing board of the City of Raleigh to order the removal of the said track, because to do so would impair the obligations of the contract of complainant in violation of the Constitution of the United States, Section 10, Article 1, which was specially set up and relied upon by complainant.

8. Because the said Court erred in holding that the right to occupy the street was not given by the act of the legislature of North Carolina because said act provided that the street occupied by a track must be restored to its former state, for that the statute
61 provides that the company shall restore the street to its former state or to such state as not unnecessarily to have im-

paired its usefulness, and the said street has been restored to such state as not unnecessarily to have impaired its usefulness, and the portion of the street occupied was expressly designated by the ordinance of August 5, 1881, and such portion of the street has been continuously occupied since the time for general railroad purposes with the knowledge of the municipal authorities until the ordinance of June 10, 1913, was adopted. The facts agreed show that Salisbury Street is 43 feet in width at this point, that there is located on the west side a sidewalk 13 feet in width, and the portion of the sidewalk on the east side occupied by the complainant's track is 10 feet wide, and that the street and the sidewalk on the west side thereof are available to and are used by the public. It further appears that complainant is the sole abutting property owner along the east side of Salisbury Street for the entire length of said track.

9. Because the said Court erred in holding that the City of Raleigh is not estopped to deny that it has given its assent to the occupation of Salisbury Street by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, for that the railroad companies having the right to occupy the street with the assent of the City of Raleigh, and with the knowledge of the proper municipal authorities having proceeded to exercise the right and having constructed, maintained and operated its track in Salisbury Street for general railroad purposes, the City of Raleigh is estopped from asserting that it has not given its assent to such use of the street.

10. Because the Court erred in holding that the assent of the City of Raleigh to the occupancy of said street will not be presumed after the lapse of so many years, and in holding that under the statutory system of North Carolina, this is but a plea of the statute of limitations, for that, as the complainant contended, the
62 assent of the City of Raleigh would be presumed by reason of the occupancy of the street by the railroad for a long period of years for general railroad purposes under such circumstances as to amount to a claim of the right to so occupy it, and for that the City of Raleigh having power to grant the right to occupy the street, such grant is presumed where the right has been exercised for a period of more than twenty years.

11. Because the said Court erred in holding that the question of whether the usefulness of Salisbury Street is unnecessarily impaired is for determination by the commissioners of the City of Raleigh, and that the wisdom of their action is manifest, for that, it is for the Court to say whether the usefulness of the street is not unnecessarily impaired.

12. Because the Court erred in holding that in the absence of express legislative grant, the terms of which are free from doubt and ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity and that said power was not granted to the commissioners of the City of Raleigh by the charter existing at the time of the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad

Company to occupy the sidewalk on Salisbury Street was adopted, August 5, 1881.

13. Because the decree of the Court is against the law and equity of the case and against the admissions and facts agreed.

14. Because in the admissions in the pleadings and the facts agreed, the complainant was entitled to injunctive relief against the enforcement of the ordinance of the City of Raleigh of June 10, 1913, as prayed for in the bill of complaint.

Wherefore, the complainant, Seaboard Air Line Railway,
63 prays that the said judgment and decree of the United States District Court for the Eastern District of North Carolina dismissing the bill of complaint in this suit and denying the complainant the injunctive relief prayed for, be reversed and that the said Court may be directed to enter a decree granting to the complainant a permanent injunction as prayed for in the bill of complaint.

JAMES H. POU,
MURRAY ALLEN,
Counsel for Seaboard Air Line Railway, Appellant.

Endorsement of Acceptance of Service.

Service accepted with copies, this 29th day of December, 1914.
JOHN W. HINSDALE, JR.,
Attorney for Defendants, Appellees.

64 Filed December 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
THE CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners in the sum of $1,000.00 lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seal- and dated this 26th day of December, 1914.

Whereas the above named Seaboard Air Line Railway has pros-

cuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the Eastern District of North Carolina, in the above entitled cause, and whereas the said City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of the City of Raleigh, have been restrained and enjoined from attempting to enforce the ordinance of the City of Raleigh adopted June 10th, 1913, directing the removal
65 of the track of the Seaboard Air Line Railway from the sidewalk on the East side of Salisbury Street between Jones Street and Lane Street in the City of Raleigh, and have been restrained and enjoined from removing or attempting to remove said track, and from in any manner hindering or obstructing the Seaboard Air Line Railway in the use of said track during the pendency of said appeal.

Now therefore, the condition of this obligation is such, that if the above named Seaboard Air Line Railway shall prosecute its said appeal to effect and answer all costs and damages that may be adjudged against it if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By JOS. B. CHESHIRE, JR., *Attorney in Fact.*
J. L. SKINNER, *Agent.*

Bond satisfactory.

JOHN W. HINSDALE, JR.,
Attorney for Defendants, Appellees.

Bond approved and to act as supersedeas this 26th day of December, 1914.

H. G. CONNOR,
District Judge of the United States District Court for the Eastern District of North Carolina.

66 Filed December 29th, 1914.

In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
THE CITY OF RALEIGH, JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Citation.

UNITED STATES OF AMERICA, *ss:*

To City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of City of Raleigh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal filed and entered December 29th, 1914, in the clerk's office of the District Court of the United States for the Eastern District of North Carolina from a final decree signed, filed and entered on the 15th day of December, 1914, in that certain suit, being in equity No. 354, wherein Seaboard Air Line Railway is complainant, and appellant, and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. G. Connor, District Judge of the
67 United States District Court for the Eastern District of North Carolina, this 26th day of December, 1914, and of the Independence of the United States, One hundred and thirty-eight.

H. G. CONNOR,
District Judge of the District Court of the United States for the Eastern District of North Carolina.

I, John W. Hinsdale, Jr., Attorney and Counsel of Record for City of Raleigh and James I. Johnson, O. G. King and R. B. Seawell, Commissioners of City of Raleigh, defendants and appellees in above entitled suit, hereby acknowledge due service of the above citation with copies of same and copies of petition for appeal, assignments of error, order allowing appeal, order restoring injunction pending appeal, bond and bill of exceptions.

This 28th day of December, 1914.

JOHN W. HINSDALE, JR.,
Attorney for Above-named Defendants, Appellees.

68 In the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

In Equity. No. 354.

SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Order Designating Record to be Sent to United States Supreme Court.

By consent of counsel the court hereby orders and directs that the following shall constitute the record in the above entitled suit to be sent to the United States Supreme Court, and to be printed in the transcript of record for use in the said United States Supreme Court, to-wit:

The Bill of Complaint, Marshal's Return, the Prosecution Bond, Equity Sub-pœna with Marshal's return, Notice to Defendants with Marshal's Return, Injunction until Hearing with Marshal's Return, Agreement of Solicitors as to Hearing, Order Continuing Injunction, Answer, Facts Agreed, Additional Facts Agreed, Opinion of the Court, Final Decree, Bill of Exceptions with Acceptance of Service, Petition for Appeal, Order Allowing Appeal, Order Restoring Injunction Pending Appeal, Assignment of Errors, Endorsement of Acceptance of Service, Bond, Citation with Acceptance of Service and this Order.

H. G. CONNOR,
Judge of the District Court of the United States for the Eastern District of North Carolina.

Consent:
JOHN W. HINSDALE, JR.,
Counsel for Complainant.
MURRAY ALLEN,
Counsel for Defendants.

69 SEABOARD AIR LINE RAILWAY, Complainant,
vs.
CITY OF RALEIGH and JAMES I. JOHNSON, O. G. KING, and R. B. SEAWELL, Commissioners of City of Raleigh, Defendants.

Order to Transmit Record.

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in said suit, be transmitted to the United States Supreme Court at Washington, D. C., and the same is transmitted accordingly.

ALEX. L. BLOW,
Clerk United States District Court, Eastern District of North Carolina.

70 *Clerk's Certificate.*

UNITED STATES,
Eastern District of North Carolina:

I, Alexander L. Blow, Clerk, United States District Court for the Eastern District of North Carolina, do hereby certify that the foregoing sixty-eight (68) pages present a true, full and correct copy of the proceedings had, and orders entered in that certain suit in equity pending in said Court, wherein Seaboard Air Line Railway is complainant and City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, Commissioners of City of Raleigh, are defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said District Court at the courthouse in Raleigh, State of North Carolina, this 18th day of January, 1915.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. L. BLOW,
Clerk U. S. District Court.

Endorsed on cover: File No. 24,524. E. North Carolina D. C. U. S. Term No. 330. Seaboard Air Line Railway, appellant, vs. The City of Raleigh and James I. Johnson, O. G. King, and R. B. Seawell, commissioners of the city of Raleigh. Filed January 20th, 1915. File No. 24,524.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,
Appellant,
v.
THE CITY OF RALEIGH
and James I. Johnson, O. G. King, and R. B. Seawell,
Commissioners of the City of Raleigh.

No. [redacted]59

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF-APPELLANT.

MURRAY ALLEN,
Counsel for Plaintiff.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

SUBJECT INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,
Appellant,
v.
THE CITY OF RALEIGH
and James I. Johnson, O. G. King, and R. B. Seawell,
Commissioners of the City of Raleigh.
No. 330

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF-APPELLANT.

STATEMENT OF THE CASE

This is a bill in equity filed by the plaintiff in the United States District Court for the Eastern District of North Carolina to secure an injunction restraining the City of Raleigh and the individual defendants, Commissioners, from enforcing an ordinance requiring plaintiff to remove its tracks from the sidewalk on the East side of Salisbury Street in the city of Raleigh, between Jones Street and Lane Street. Plain-

tiff alleged that by a prior statute and ordinance a contractual right to occupy said sidewalk had been created, the obligation of which is impaired by the ordinance, the enforcement of which it is desired to enjoin.

The cause was submitted upon the bill and answer and statement of facts agreed. (Printed record, pages 1, 12, and 15.) The District Court rendered judgment refusing the injunction and dismissing the bill and plaintiff appealed.

In the opinion of District Judge Connor, (Printed record, page 18,) the facts are set out as follows:

Plaintiff is a Virginia corporation and successor to the property, rights and franchises of the Raleigh & Gaston Railroad Company, chartered by the General Assembly of North Carolina, at its session of 1835. The city of Raleigh was the Southern terminus of said railroad. Pursuant to the provisions of the charter, the said company constructed a track from Gaston N. C., to Raleigh, N. C., and constructed terminals and depots, in said city, for the receipt and delivery of freight and passengers, including a freight depot and a warehouse on Halifax Street between Lane and North Streets, extending from Halifax Street to Salisbury Street, extending its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury Street into said depot and warehouse. During the year of 1881, a cotton compress was constructed on a lot in the city of Raleigh, bounded by Salisbury, Jones Halifax and Lane Streets and, for the purpose of delivering to, and receiving cotton from said warehouse, and to serve the patrons of the said railroad company, and to furnish the public facilities for the delivery of cotton. (Note: This should be "freight." See Bill of Complaint, Section 6, record, page 2), in car load lots, and to better perform its functions as a common carrier, the Raleigh & Gaston Railroad company made application to the Board of Aldermen of Raleigh for the grant of the right, privilege or franchise, to occupy the sidewalk on the east side of Salisbury Street between Jones and Lane Streets for the pur-

pose of constructing a track thereon. Said Board of Aldermen on August 5, 1911, adopted the following resolution, or ordinance:

> "Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

When the track was constructed, pursuant to the permission granted by said ordinance, it was used as a public track in connection with the cotton compress in the cotton season, and was used for the purpose of loading and unloading freight for the public, without additional compensation to the railroad for its use, and for any other purpose for which the railroad company desired to use it. Since the year 1906, the cotton compress has not been used. Since that date the said track has been used exclusively for loading and unloading freight and storing empty cars engaged in intra and interstate traffic. It has been, and is now, used by the merchants of the city of Raleigh and by the public and on account of its location, is convenient for the said purpose. The right to maintain said track, as it is now placed and used on Salisbury Street, is of value to plaintiff exceeding $3,000 exclusive of cost herein.

The track has been maintained and operated by the Raleigh & Gaston Railroad Company and the plaintiff, its successor, since 1881, with the knowledge and permission of the officers and representatives of the City of Raleigh. The plaintiff is the sole owner and occupant of the block of land, in said city, bounded on the west by Salisbury Street, on the north by Lane Street, on the east by Halifax Street and on the south by Jones Street, and is the sole owner and occupant of the block in said city next adjacent to said block and to the north thereof, bounded on the west by Salisbury Street, on the north by North Street, on the east by Halifax Street

and on the south by Lane Street. The two blocks are used by the plaintiff for the purpose of conducting its business exclusively. Salisbury Street is forty-three feet wide between curbs at that point at which the track is located on the sidewalk, and in addition thereto, there is located a sidewalk on the west side of the street 13 feet wide, the portion of the sidewalk on the east side of the street occupied by the plaintiff's track, is 10 feet wide; the street and the sidewalk on the west side thereof, are available to, and are used by, the public. In constructing a new freight station two years ago, it was necessary for the Seaboard Air Line Ry. Company to make an excavation at the corner of Jones and Salisbury Streets of about eight feet, extending northwards along Salisbury Street, the tracks constructed in connection with said freight station are in this excavation and the freight station is between these tracks and Halifax Street. They cannot be used as team tracks, and the other team tracks of plaintiff, are on Lane Street, which is one block north of Jones Street, a distance of 420 feet; the said track on Salisbury Street extends from Jones Street to Lane Street. The Southern end of the track on Salisbury Street is one block north of the State Capitol, a distance of 420 feet. With the track as it is now laid and used, there is no sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for use by pedestrians. Within the two years last past plaintiff has built on the site upon which the compress stood, and immediately to the east of said side track, a commodious freight warehouse, with an approach to the same by wagons from the east on the side of the building opposite said side track with two tracks between said depot, and the east line of the sidewalk in question and, in addition thereto, has constructed several team tracks to the north of said warehouse.

At their meeting, on June 10, 1913, the defendants, Commissioners of the City of Raleigh, after hearing the matter, and against the protest of plaintiff, adopted a resolution ordering the removal of the track constructed and maintained

by plaintiff on the sidewalk, on the east side of Salisbury Street, between Jones and Lane Streets, being the track described in the resolution, or ordinance of August 5, 1881. By said resolution, the Commissioner of Public Works of the city of Raleigh was directed, if plaintiff failed to do so, to remove the said track. Certain Private Laws are set out, or referred to, in the Bill and are to be considered as evidence. A preliminary injunction was issued and the cause heard upon the prayer for a permanent injunction restraining defendants from removing said track, or otherwise enforcing said resolution or ordinance of June 10, 1913. It is conceded that the plaintiff is entitled, by succession, to such rights, privileges and franchises as vested in the Raleigh & Gaston Railroad Company by virtue of its charter, and amendments thereto, and the ordinance of August 5, 1881, or which it may, upon the facts herein set out, have acquired.

SPECIFICATIONS OF ERROR.

The complainant specifies and relies upon the following errors in the judgment and opinion of the District Court:

1. Because the United States District Court for the Eastern District of North Carolina erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the ordinance of the City of Raleigh, ordering the removal of the track of the complainant from the street and sidewalk on the east side of north Salisbury Street in the City of Raleigh between Jones and Lane Streets, will impair the obligation of a valid and binding contract between the City of Raleigh and the complainant in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

2. Because the said Court erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article I, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

3. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company, predecessor of complainant, had the power, with the assent of the municipal authorities of the city of Raleigh, to occupy the sidewalk on the east side of North Salisbury Street between Jones and Lane Streets in the city of Raleigh, for the purpose of running a track thereon, the said power being specifically granted by the acts of the General Assembly of North Carolina, Session of 1871-2, Chapter 38, Section 29, Sub-section 6, as brought forward and amended by the Code, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) to construct their road across, along or upon any stream of water, water course, street, highway, plankroad, turnpike, or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plankroad and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be con-

strued to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That the said track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the said act of the General Assembly of North Carolina, with the assent of the city of Raleigh, and the enforcement of the ordinance enacted by the Commissioners of the city of Raleigh ordering the removal of said track will impair the obligation of the contract thereby created in violation of Section 10, Article 1, of the Constitution of the United States, the provisions of which article and section were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

4. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that the lapse of time, more than thirty-one years during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company and its successor and assign, Seaboard Air Line Railway, complainant in this suit, the right to retain said track, which right constitutes a contract subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of said ordinance ordering the removal of said track will result in impairing the obligations of said contract in violation of the said provisions of the Constitution of the United States, the protection and benefit of which article and section of the Constitution the complainant expressly set up and relied upon.

5. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that it appears from the admissions in the pleadings and the facts agreed that said track was placed in Salisbury Street and has remained there under and by virtue of a contract, the obligations of which will be impaired by the enforcement of the ordinance ordering its removal, in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by the complainant.

6. Because the Court erred in holding that the complainant's claim is based upon the language of an ordinance, adopted thirty years ago to meet a temporary condition, for that it appears from the admissions in the pleadings and the facts agreed that the track was constructed for a permanent purpose, that when the track was constructed pursuant to the permission granted in the ordinance of the City of Raleigh, adopted August 5, 1881, it was used as a public track in connection with the cotton compress of complainant in the cotton season and was used for the purpose of loading and unloading freight for the public and for any other purposes for which the railroad company desired to use it.

7. Because the Court erred in holding that the ordinance of the City of Raleigh of August 5, 1881, does not vest in complainant the property right in the use of said sidewalk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the Legislature with the power to make such exclusive, perpetual grant of the sidewalk to the Raleigh & Gaston Railroad Company, which prevents the present governing board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the sidewalks for the benefit of the public from making and enforcing the ordinance of June 10, 1913,

for that the ordinance of August 5, 1881, granted permission to occupy the sidewalk for general railroad purposes in perpetuity and the acceptance of the grant and the expense incurred in the construction of the said track created a valid and binding contract between the City of Raleigh and the Raleigh & Gaston Railroad and its successor, Seaboard Air Line Railway, to maintain its track in the said street in perpetuity, and for that the right to construct and maintain its tracks in the streets of the City of Raleigh was given the Raleigh & Gaston Railroad Company by the act of the Legislature of North Carolina, with the assent of the City of Raleigh, and such assent was given by the ordinance of August 5, 1881, and by acquiescence in the occupancy of the sidewalk by the track for all purposes by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, and for that the acquiescence of the City of Raleigh for more than thirty-one years in the use of said sidewalk by the Raleigh & Gaston Railroad and by its successor, Seaboard Air Line Railway, has created the right to retain said track, which right constitutes a contract and it is not within the power of the governing board of the City of Raleigh to order the removal of the said track, because to do so would impair the obligations of the contract of complainant in violation of the Constitution of the United States, Section 10, Article 1, which was especially set up and relied upon by complainant.

8. Because the said Court erred in holding that the right to occupy the street was not given by the act of the Legislature of North Carolina because said act provided that the street occupied by a track must be restored to its former state, for that the statute provides that the company shall restore the street to its former state or to such state as not unnecessarily to have impaired its usefulness, and the said street has been restored to such

state as not unnecessarily to have impaired its usefulness, and the portion of the street occupied was expressly designated by the ordinance of August 5, 1881, and such portion of the street has been continuously occupied since that time for general railroad purposes with the knowledge of the municipal authorities until the ordinance of June 10, 1913, was adopted. The facts agreed show that Salisbury Street is forty-three feet in width at this point, that there is located on the west side a sidewalk thirteen feet in width, and the portion of the sidewalk on the east side occupied by the complainant's track is ten feet wide, and that the street and the sidewalk on the west side thereof are available to and are used by the public. It further appears that complainant is the sole abutting property owner along the east side of Salisbury Street for the entire length of said track.

9. Because the said Court erred in holding that the City of Raleigh is not estopped to deny that it has given its assent to the occupation of Salisbury Street by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, for that railroad companies have the right to occupy the streets with the assent of the City of Raleigh, and with the knowledge of the proper municipal authorities having proceeded to exercise the right, and having constructed, maintained and operated its track in Salisbury Street for general railroad purposes, the City of Raleigh is estopped from asserting that it has not given its assent to such use of the street.

10. Because the Court erred in holding that the assent of the City of Raleigh to the occupancy of said street will not be presumed after the lapse of so many years, and in holding that under the statutory system of North Carolina, this is but a plea of the statute of limitations, for that, as the complainant contended, the assent of the City of Raleigh would be presumed by rea-

son of the occupancy of the street by the railroad for a long period of years for general railroad purposes under such circumstances as to amount to a claim of the right to so occupy it, and for that the City of Raleigh having power to grant the right to occupy the street, such grant is presumed where the right has been exercised for a period of more than twenty years.

11. Because the said Court erred in holding that the question of whether the usefulness of Salisbury Street is unnecessarily impaired is for determination by the commissioners of the City of Raleigh, and that the wisdom of their action is manifest, for that, it is for the Court to say whether the usefulness of the street is unnecessarily impaired.

12. Because the Court erred in holding that in the absence of express legislative grant, the terms of which are free from doubt and ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity, and that said power was not granted to the commissioners of the City of Raleigh by the charter existing at the time of the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury Street was adopted, August 5, 1881.

13. Because the decree of the Court is against the law and equity of the case and against the admissions and facts agreed.

14. Because upon the admissions in the pleadings and the facts agreed, the complainant was entitled to injunctive relief against the enforcement of the ordinance of the City of Raleigh of June 10, 1913, as prayed for in the bill of complaint.

QUESTIONS IN THE CASE.

After conceding that the charter of the city of Raleigh in force at the time of the adoption of the ordinance of August 5, 1881, conferred upon the governing board the power to grant a quasi public corporation the right to a reasonable use of the public streets, not inconsistent with the right of the public, and that when such right of user is granted, within the power of such authorities, and such grant is accepted and acted upon, a property right vests in the grantee of which it may not be deprived otherwise than by due process of law, Judge Connor says:

"Notwithstanding these concessions, two questions remain open for decision. Did the ordinance of 1881 construed in the light then existing conditions, and the reasons inducing its passage, grant to plaintiff's predecessor in title a right to be enjoyed in perpetuity to appropriate to its use, by locating and maintaining a track thereon, to the exclusion of all others, the sidewalk for any and all purposes connected with the operation of its freight traffic, and if so, was such grant within the power of the Board of Commissioners to make?" (Printed record, page 21.)

We respectfully submit that the questions arising in this case are much more extended than this statement by the learned District Judge. The plaintiff contends:

1. That the authorities of the city of Raleigh, at the time of the grant of permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on the east side of Salisbury Street, had power to grant such right.

2. That if the power did not exist in the city of Raleigh to grant the right to occupy the sidewalk, such right was granted by statute enacted by the General Assembly of North Carolina.

3. That if this statute granted such right only when the municipality gave its assent to the railroad company, such assent was expressly given by the city of Raleigh

to the Raleigh & Gaston Railroad Company by the ordinance of 1881.

4. That it is not essential that such assent be in the form of a grant.

5. That if such assent was not expressly given by the ordinance of 1881, the city is estopped by the lapse of time and by its acquiescence to deny that it has given its assent.

6. That after the lapse of so many years the assent of the city of Raleigh will be presumed.

7. That the grant by the city of Raleigh of the right to occupy the sidewalk, when acted upon by the railroad company by the construction of its track, created a contract right in perpetuity the obligation of which cannot be impaired by the ordinance of June 10, 1913, requiring the defendant to remove the track.

8. That the statute enacted by the General Assembly, authorizing a railroad company to construct its tracks in a public street, when accepted by the construction of the tracks of the Raleigh & Gaston Railroad on the sidewalk of Salisbury Street, created a contractual right in perpetuity the obligation of which cannot be impaired by the ordinance of June 10, 1913, requiring the defendant to remove the track.

Incidental questions which arise under these main heads are set out in the course of the argument herein.

ARGUMENT

Jurisdiction of United States Courts.

This case is before the court on direct appeal from the judgment of the District Court under section 238, Judicial Code.

Referring to the jurisdiction of the United States District Court, District Judge Connor says:

> "While it is settled by abundant authority, that Courts of Equity will not, save in exceptional cases, enjoin the

enforcement, or execution of the criminal law, or of city ordinancees imposing fines and penalties for their violation, it is also settled that where rights of property are involved, and the enforcement of such ordinances violates vested rights, injunctive relief will be awarded, especially where such enforcements will work irreparable injury. In *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, the court enjoined the enforcement of an ordinance revoking a grant of a franchise to occupy the streets of a city. The power of the court to enjoin the enforcement of an ordinance regarding railroad tracks in the streets was recognized in *A. C. L. R. R. Co. v. Goldsboro,* 232 U. S., 548."

The District Court has jurisdiction in a case of this character regardless of citzenship of the parties.

Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311.

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have a contract with the city, which the latter had attempted to impair."

City Ry. Co. v. St. R. Co., 166 U. S., 557.

The United States Supreme Court Will Determine for Itself Whether a Contract Exists and Whether Its Obligation Has Been Impaired.

It seems to be well settled by the decisions of this court that in considering the effect of the action of the governing body of a municipal corporation insofar as it is contended that such action creates a valid and binding contract, and whether the obligation of such contract, if it exists, is impaired by the subsequent action of the governing body of such municipal corporation, this court will determine such questions for itself.

New York Electric Line Co. v. Empire City Subway Co., 235 U. S., 179.

Russell v. Sebastian, 233 U. S., 195.

"Whether the repeal of so much of a municipal ordinance granting trackage rights in a city street to a railway company as relates to double tracks was presumptively a reasonable exercise of the police power or a legislative impairment of the contract ordinance is a question which the Federal Supreme Court, on writ of error to a State Court, must decide for itself independently of the decisions of the State Court."

Grand Trunk Western Ry. Co.v. South Bend, 227, U. S., 544.

The Authorities of the City of Raleigh, at the Time of the Grant of Permission to the Raleigh & Gaston Railroad Company to Occupy the Sidewalk on the East Side of Salisbury Street, Had Power to Grant Such Right.

The plaintiff contends that the city had this authority under its general powers and by the terms of its charter in force at the time the permission to construct the track was granted.

The question of the right granted by the general statute authorizing railroads to occupy streets with the consent of the municipality is discussed under another head at page 21 of this brief.

"A city has authority, under its general powers, to grant to private parties for public purposes reasonable rights and privileges in its water system, its streets, its public grounds and its other public utilities, provided that such grant and its exercise does not materially impair the usefulness of these utilities for the public purposes for which they were acquired or dedicated."

Power Co. v. Colorado Springs, 105 Fed. 1.

"Municipal corporations, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street provided

that the use does not destroy or unreasonably impair the street as a highway for the general public."

New Castle v. R. R. 155 Ind. 18.
C. B. & Q. R. R. v. Quincy, 136 Ill., 489.

The charter of the city of Raleigh was revised and consolidated in chapter 98 of the Private Acts of 1856-57, section 58 of which is as follows:

"That the Commissioners shall cause to be kept clean and in good repair streets, sidewalks and alleys. They may establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them."

The plaintiff contends that the power granted by this section is sufficient to include the power to permit the Raleigh & Gaston Railroad Company to occupy the sidewalk on the east side of Salisbury Street for the purpose of running a track. We submit that this section carries with it the power to *regulate* the streets of the city of Raleigh, and the power to regulate has been held to embrace the power to grant to a public service corporation the right to use the streets.

Owensboro v. Cumberland Telephone & Telegraph Co. 230 U. S., 58.

The question of the power of a municipality to grant to a quasi public corporation the right to occupy the public streets under the provisions of a charter issued by the State Legislature giving the municipality the power to regulate its streets seems not to have been definitely decided by the Supreme Court of North Carolina. Upon this point District Judge Connor says:

"Conceding that the power granted the Commissioners, in regard to the use of the streets, includes the power to 'regulate' such use, and giving to this language the

interpretation given it in *Cumberland Telephone Company Case, supra,* and in *Moore v. Power Company, supra,* the question is yet open, whether the power claimed by plaintiff is conferred. In *State v. Railroad,* 141 N. C., 736, the Supreme Court of this State held: 'In the absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street cannot be construed as a grant of a permanent easement.' After citing authorities, it is said: 'The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies, is something which can not be bartered away in such manner as to disable them from the performance of their public functions.' While the Supreme Court of this State has, in a number of cases, sustained the power of the Commissioners, or other governing body of municipalities, to grant to public service corporations the right to place their tracks, poles, wires, pipes, etc., in, under and along the public streets, no case has been found in which the power has been claimed to grant an exclusive and perpetual use of a street, or sidewalk, to such corporations."

In *Butler v. Tobacco Co.,* 152 N. C., 416, the Supreme Court of North Carolina considered the power of a municipal corporation to grant a railroad company the right to occupy the public street for the construction of a private siding to the plant of the tobacco company. It was held that in the absence of legislation the municipal authorities could not grant any use of the streets for a private purpose.

It is true that in *State v. Railway,* 153 N. C., at page 562, Chief Justice Clark says that the Court has already held in *Butler v. Tobacco Co.,* 152 N. C., 416, that "without express legislative authority the streets of a city cannot be taken for railroad purposes, even with the consent of the town

authorities." An examination of that case will show that it did not go to the extent of holding that under the terms of a charter giving a municipality power to regulate its streets, the right could not be conferred on a railroad company to occupy the streets for a public purpose. The authority conferred upon the board of aldermen of the municipality does not appear in the opinion in that case, and it is to be assumed that the charter did not confer such authority on the municipal authorities, either expressly or by necessary implication.

In referring to *Griffin v. Railroad,* 150 N. C., 312, Chief Justice Clark says that there was express legislative authority for the occupation of the street by the railroad and that the board of aldermen also granted their permission under authority conferred upon them in the city charter. The opinion in that case shows that the authority of the railroad company to occupy the street was based upon the general statute authorizing a railroad to occupy the streets of a town, as shown by the following quotation:

> "The Revisal, Section 2567 (5) expressly grants to railroad companies the right to use the streets of a town or city with 'the assent of the corporation of such city.' The assent of the city to the use of Beech Street by the defendant railroad companies for this purpose has been duly given by resolution of its board of aldermen."

In this case the Court says:

> "The city clearly possessed the statutory right to assent to the use of the street by the railroad company. This is a most essential power necessary to be used for the benefit of the people of the city."

The language of the Court in the Griffin Case also indicates that the authorities of the town of Goldsboro had the power under the charter to grant the right to the use of the street. Chief Justice Clark says:

> "The chief street in Goldsboro, running through its center and for the whole length of the town, has been used for over seventy years by one railroad, for sixty years by two, and for half a century by all three of these railroads. It is singular that it should now be contended that 420 feet of this remote street, almost on the edge of the town, cannot thus be used, with the assent of the town, whose charter confers on it the right to change and even abolish any street."

We submit that in none of the cases decided by the Supreme Court of North Carolina has it been held that the language of a charter similar to the charter of the city of Raleigh, in force in 1881, does not confer the power upon a municipal corporation to grant to a railroad company the right to place its tracks in a public street, and that the statement of general principles in some of the cases will not be strongly persuasive when this court comes to consider that question. It has been held that in determining the meaning of the statute alleged to create the contract much weight will be given the decisions of the State court construing such statute, but they will not be binding upon this court. Thus, it has been said:

> "It is true that this Court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract requires this Court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the decisions of the highest court of the State. Among

other cases which have asserted this principle are *Freeport Water Co. v. Freeport,* 180 U. S., 587; 45 L. Ed., 679; 21 Sup. Ct. Rep., 493, and *Vicksburg v. Vicksburg Waterworks Co.,* 206 U. S., 496, 509; 51 L. Ed., 1155, 1160; 27 Sup. Ct. Rep., 762."

Milwaukee Elec. R. & L. Co. v. Railroad Com., 35 Sup. Ct. Rep., 820.

In the case cited the State Court had construed the very statute under consideration, but there is no decision of the Supreme Court of North Carolina construing the language of the charter of the City of Raleigh.

The nearest approach to it is the construction by the Court of the Goldsboro charter, which Chief Justice Clark says in *Griffin v. Southern Ry. Co., supra,* confers on the municipality "the right to change and even abolish any street." It is strongly intimated, as we have said, that such right included the right to grant to a railroad company authority to construct its tracks in the streets of the municipality.

The charter of the City of Raleigh in force at the time of the construction of this track on Salisbury Street, provided that the Commissioners could "reduce the width" of all the streets within the limits of the corporation. (Printed Record, page 17.)

Under the charter now in force, and which was in force when the ordinance of 1913, ordering the removal of this track, was adopted, the commissioners of the City of Raleigh have power:

> "To direct, control and prohibit the laying of railroad tracks, turnouts and switches in the streets, avenues and alleys of the city, unless the same shall have been authorized by ordinance, etc." (Printed Record, page 17.)

This is a legislative inhibition upon the power of the Commissioners of the City of Raleigh to order the removal

of tracks from the public streets when such tracks "shall have been authorized by ordinance." It is also a legislative recognition of the right of the railroads to occupy the streets of Raleigh when authorized by ordinance to do so.

The Right To Construct This Track in the Street is Granted by Statute.

The right to occupy the streets may be given by the Legislature without the consent of the municipality.

Elliott on Roads and Streets, Section 1045.

The power given a railroad company by the Legislature to occupy the streets of a town with its track is altogether independent of the municipality.

Millvale v. Railroad, 7 L. R. A., 369.
Grand Trunk Wesern R. Co. v. South Bend, 227 U. S., 544.

The general statutory authority of a railroad to construct its track in a street in this State was first embodied in Chapter 138, Sec. 29(5), of the Acts of 1871-72, which was applicable, however, only to companies chartered under the provisions of that act.

Section 29(5) of Chapter 138 of the Acts of 1871-72 was brought forward in The Code of 1883, Section 1957, Sub-section 5, and the powers granted were extended to *all existing railroads* by Section 1982 of The Code of 1883.

The provisions of the statutes, (The Code, Sections 1957(5) and 1982) upon which the plaintiff relies were brought forward in Revisal of North Carolina of 1905, Section 2567, Sub-section 5, as follows:

> "All existing railroads shall have power: To construct its road across, along, or upon any stream of water, watercourse, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the

stream or watercourse, street, highway, plankroad and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be constructed to authorize the erection of any bridge or any other obstruction across, in, or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

The Raleigh & Gaston Railroad Company was chartered prior to 1871, (See Rev. Statutes of N. C. Vol. 2, page 299 for charter), and hence was not incorporated under the provisions of the Act of 1871-72, Chapter 138. The assent of the City of Raleigh to the construction of a spur track in Salisbury Street was given in 1881, as is shown by the following entry in the minutes of the meeting of the board of aldermen of August 6, 1881:

> "Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

In 1883, at the time The Code was adopted the powers granted by the Act of 1871-72 were extended to *all existing railroads,* thereby giving the Raleigh & Gaston Railroad Company power "to construct its road across, along or upon any street which the route of its road shall intersect or touch," provided "the company shall restore the street thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness." The extension of this authority so as to include the Raleigh & Gaston Rail-

road Company, gave that company ample authority for its occupation of Salisbury Street. At the time of the enactment of the Code, Sections 1957 and 1982, *the track was already located in Salisbury Street.* It would, therefore, seem that this track is not affected by the limitation, placed upon the exercise of the right to construct a track in a street by the statute, as follows: "Nothing in the chapter contained shall be construed to authorize the construction of any railroad *not already located in,* upon or across any street in any city without the assent of the municipality."

Authority to Occupy the Street Includes Authority to Occupy the Sidewalk.

The word "street" includes sidewalk, and in granting railroads the right to occupy a public street, with assent of the municipality, the language of the statute is broad enough to include sidewalks. We are not concerned with the rights of abutting owners, because in this case the plaintiff is the sole owner of the property adjacent to the sidewalk occupied by the track. In the absence of complaint by the abutting owner the State has the same control of the sidewalks of a municipal corporation as it has of any other part of the street. The Supreme Court of North Carolina so held in *Hester v. Traction Co.,* 138 N. C., 293, in which Chief Justice Clark says:

> "The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians. 27 Am. & Eng. Ency. (2d Ed.), 103; *Ottawa v. Spencer,* 40 Ill., 217; *Chicago v. O'Brien,* 53 Am. Rep., 640. . . . Sidewalks are of modern origin. Anciently they were unknown as they still are in eastern countries and in perhaps a majority of the towns and villages of Europe. In the absence of a statute a town is not required to construct a sidewalk. *Attorney General v. Boston,* 142 Mass., 200. It is for the town to prescribe the width of the sidewalk. In the absence of

statutory restriction it may widen, narrow or even remove a sidewalk already established. *Attorney General v. Boston, supra.* To widen a sidewalk narrows the roadway. To widen a roadway narrows the sidewalk. The proportion of the street to be preserved for pedestrians and vehicles respectively is in the sound discretion of the town authorities."

Alleghany County Light Co. v. Booth, 216 Pa., 564; 4 Words and Phrases (Second Series) page 711.

"The term street in ordinary legal signification includes all parts of the way, the roadway, the gutters and the sidewalks."

Elliott on Roads and Streets, (3rd Edition) Sec. 23.

In the present case it appears that there is forty-three feet of space in Salisbury Street at the point where this track is located devoted to the use of vehicles and a sidewalk thirteen feet in width to the west thereof devoted to the use of pedestrians. (Printed Record, page 16.)

We call attention to the fact that the ordinance of 1881 expressly assents to the use of the *sidewalk,* thereby manifesting the exercise of the discretion of the municipal authorities as to the part of Salisbury Street to be occupied by plaintiff's tracks.

"The designation of the street to be used is a matter to be determined by the governing body of the city, with an eye to the general welfare."

Griffin v. Southern Ry. Co., 150 N. C., 312.

The City of Raleigh Has Given Its Assent.

But should the statute, The Code, Section 1957(5), be construed to require the assent of the municipality before the authority to construct a track in a street could be obtained, the Raleigh & Gaston Railroad secured such as-

sent in 1881, and it was unrevoked and was in effect at the time of the adoption of the Code in 1883. This assent secured in 1881 was ratified by the continuous and uninterrupted occupation of the street until the year 1911, with the full knowledge and consent of the municipal authorities of the city of Raleigh. (Facts agreed, paragraph 4, record, page 16.)

In the case of the *City Railway v. Citizens' Street Railroad Company,* 166 U. S., 557, it appears that in December, 1889, the Common Council of the city of Indianapolis adopted an ordinance amendatory of the original ordinance granting the Citizens' Street Railroad Company the right to use the streets, adopted January 18, 1864, to the effect that "the cars to be used on such tracks shall be operated with animal or electrical power only." At the time this amendatory ordinance was adopted there was no law of the state permitting electricity to be used and it was claimed that the Common Council exceeded its powers in authorizing this change to be made. The Supreme Court held otherwise, Mr. Justice Brown saying:

> "But it seems that on March 3, 1891, a law was enacted by the General Assembly, declaring that any street or horse railroad heretofore or hereafter organized . . . may, with consent of the Common Council of the city . . . use electricity for motive power. Conceding, though not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority to do so, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter."

The legislature of North Carolina certainly had the power to authorize railroads to construct their tracks along public streets with the assent of the municipality, and when such assent is given and the authority acted upon by the construction of the track, a contractual right is created which cannot be impaired by subsequent legislation.

> New York E. L. Co. v. Empire City Subway Co., 235 U. S. 179.

In this case the legislature of the State of New York authorized certain companies to place their wires under the streets of the cities of New York and Brooklyn, provided that they first obtain from the common council of such cities *"permission to use the streets"* for such purposes. The common council of the city of New York adopted a resolution "that permission be and hereby is granted to New York Electric Lines Company to lay wire or other conductors of electricity in and through the streets, avenues, and highways of New York City," etc. In discussing the position that the municipal consent makes effectual the rights granted by the State, Mr. Justice Hughes quotes with approval the following language in the opinion in *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510:

> "It is true that the franchise comes from the state, but the act of the local authorities, who represent the state by its permission and for the purpose, constitutes the act upon which the law operates to create a franchise."

> Grand Trunk Western Ry Co. v. South Bend, 227, U. S. 544.

The City of Raleigh is Estopped to Deny That It Has Given Its Assent.

We submit that the City of Raleigh, after the lapse of thirty-two years, is estopped to deny that its assent was given

to the occupation of Salisbury Street by the tracks of the Raleigh & Gaston Railroad. It has stood by and seen the merger and consolidation of the Raleigh & Gaston Railroad with the Seaboard Air Line Railway and other railroads under legislative authority, knowing that the track on Salisbury Street and the right to occupy the street was a valuable asset of the Raleigh & Gaston Railroad, and included as such in appraising the value of its property for the purposes of the merger, and that it was used by the Raleigh & Gaston Railroad and Seaboard Air Line Railway as a basis of credit. (For history of this consolidation, see *Spencer v. Seaboard Air Line Railway,* 137 N. C., 107.)

Judge Dillon in discussing the right of a railroad to occupy the streets says:

> "If the municipality has the power to grant such right or franchise and a corporation believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right or franchise, and has constructed, maintained and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far at least, as concerns its failure to pass an ordinance or take the steps necessary to effectuate the grant."
>
> Dillon on Municipal Corporations, (5th Ed.) Section 1242.

This statement of the law by Judge Dillon is fully supported by the decision of this Court in *City Ry. Co. v. Citizens' St. R. Co.,* 166 U. S., 557, in which it is held that:

> "A city which, without express legislative power to do so, has authorized a street railway company to change

from horse power to electricity, will be estopped from setting up a want of such power, after the company has incurred large expenditures in making the change, and after the Legislature by a subsequent general law has conferred power on city councils to authorize such changes."

The City of Raleigh, since 1883, has had the power by its assent to effectuate the right granted to the plaintiff by the Legislature, along with other railroads, to occupy the streets of a municipal corporation with the assent of such corporation, and certainly it should be estopped by the conduct of its officers and representatives in acquiescing in the occupation of Salisbury Street from asserting at this late day that since the Statute of 1883 was enacted it has not given its assent thereto.

See Note 11 A. & E. Anno. Cases, page 295.

After the Lapse of so Many Years, the Assent of the City of Raleigh Will Be Presumed.

Dillon on Municipal Corporations (5th Edition), page 1947, says:

"No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision, and in such case it has been said that so far as the constitution is concerned, such consent may be either express or implied. And it has been held that the consent of the municipality required by statute *may be presumed* where the streets of the municipality have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them." (Italics added.)

In *New Castle v. Railroad,* 155 Ind., 18, the Indiana Supreme Court holds:

"The occupation of the streets of a municipality by a railroad company with its tracks for a period of thirty

years under such circumstances as to amount to adverse possession raises the presumption of a grant."

See also Chicago v. Union Stock Yards, 164 Ill., 226.

In *New Castle v. Railroad, supra,* the Indiana Supreme Court says:

> "Prescription is the presumption of a grant. There can be no presumption of a grant, if the alleged grantor is lacking in a legal capacity and if the subject-matter of the grant is unlawful. No length of user would give a railroad company the absolute ownership of a street, for that is not the municipality's to grant. But property that a municipality has the power to convey may be acquired from it by prescription. In *Jorgenson v. Squires,* 144 N. Y., 280, and in *People v. Collis,* 45 N. Y. Supp., 282, it was held that the Legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued use of such a structure for more than twenty years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of grant." (Page 26.)

This position is supported by *Turner v. Commissioners,* 127 N. C., 153, which has been decided since the enactment of Section 389 of the Revisal, providing that title to a street cannot be acquired by adverse possession. It is held that where the municipal corporation has the power of alienation, title can be acquired by twenty years adverse possession.

> "As to streets, ways, squares, parks, commons, and other property which a municipal corporation may hold in trust for the public use, without power to alienate, it is true that no statute of limitations can run . . . Since no one would obtain any title there if he had a deed from the town, no adverse possession, however

long, would bar the town; and the same was the civil law. This has been affirmed in this State by statutory declaration (see Revisal, Section 389); but as to all other matters the Statute of Limitations runs against a municipality as against anyone else. Acts of 1831-32, above cited, took from the commons here in question its inalienability. Sale thereof was authorized. Much of it was sold. A conveyance from the town since that date for any part thereof would be valid, and it follows that twenty years adverse possession up to a known and visible boundary,—the row of cedar trees, the dotted line on the map—confers a good title."

Town officers are given power to sell the property of the town to a railroad by Code, Section 1955; Revisal of 1905, Section 2596.

In *Pipkin v. Wynns,* 13 N. C., 402, it appeared that Thomas Wynns had conducted a ferry across the Chowan river from the year 1790 to 1825, but it did not appear that the said Wynns had ever obtained an order of the County Court establishing such ferry, as was required by the statute. It also appears that after the death of Thomas Wynns, the defendants applied to the County Court, and were appointed ferry keepers. The plaintiff, one of the heirs of Thomas Wynns, contested the validity of the grant to the defendants, contending that the right to run the ferry belonged to the heirs of Thomas Wynns. While the disposition of the case did not require a decision of the question of presumption, Chief Justice Henderson says: *"We are of opinion, also, that in this case, the long user is sufficient to raise the presumption of a grant;* but this it is unnecessary to consider."

There can be no doubt that a grant from the County Court, as well as from the State directly, or from an individual, may be proved by a user for forty years, or even less.

Barrington v. Ferry Co., 69 N. C., 896.
See State v. Long, 94 N. C., 896.

If the City of Raleigh had the power, either under its charter or under the general law to grant the right to a railroad company to occupy the public streets with its track, as we contend it did have, then the lapse of time will raise a presumption of such grant, and certainly the lapse of time will raise a presumption of the *assent* of the City of Raleigh to such occupation.

But it is said that the ordinance of 1881 was a mere license revocable at the will of the authorities of the City of Raleigh and the occupancy of this sidewalk was not adverse until the plaintiff was ordered to remove it in 1913, and, therefore, there could be no presumption of a grant of the right. We submit that this view entirely disregards the contention of the defendant that the *assent* of the municipality will be presumed. We submit further that it is based upon a misapprehension of the force and effect of the ordinance of 1881.

The Ordinance of 1881 is not a Revocable License, but is a Grant of the Right to Occupy the Sidewalk.

The language of the ordinance is that the Raleigh & Gaston Railroad "was granted permission to occupy the sidewalk," etc. Under the authority thus granted, the Raleigh & Gaston Railroad proceeded at much expense to extend its track along the sidewalk for a distance of more than 420 feet. It was not a temporary track for a temporary purpose, but, as will appear in Paragraph 3 of the Facts Agreed (Printed Record, page 15), it has *"since its construction been used by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, as a public track for the delivery and receipt of freight for intra and interstate transportation, and it has been and is now used by the merchants of the City of Raleigh and by the public, and the track on account of its location is convenient for this purpose."*

An ordinance becomes a contract, whether regarded as a

franchise, license or mere permission, and a city cannot impair or destroy the rights conferred.

Southern R. R. v. Portland, 177 Fed., 959.

In the case of *Owensboro v. Cumberland Telephone & Telegraph Company,* 230 U. S., 58, it appeared that an ordinance containing the following provision was passed by the Common Council of the Town of Owensboro, Ky.

> "That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved, smooth, set plumb and set erect, and any number of wires thereon, with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city."

The other provisions of this ordinance related to the manner of the construction of the poles and lines of the telephone company and provided that the right granted should not be construed as an exclusive right. There was no provision whatever limiting the period for which the rights granted by this ordinance should run.

In holding that the ordinance created more than a mere license, Mr. Justice Lurton says:

> "That the right conferred by the ordinance involved is something more than a mere license is plain. A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. See *Greenwood*

Lake & P. J. R. Co. v. New York & G. L. R. Co., 134 N. Y., 435; *Southampton v. Jessup*, 162 N. Y., 122, 126.

"That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the State through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law, and it was subject to all of the police power of the city.

"That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases: *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S., 368, 395; *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 661; *Boise Artesian Hot & Cold Water Co. v. Boise City*, opinion just handed down (230 U. S., 84). As a property right it was assignable, taxable, and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit.

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general

law of the State, or by the corporate powers of the city making the grant."

Grand Trunk Western Ry. Co. v. South Bend, 227 U. S., 544.

New York E. L. Co. v. Empire Subway Co., 235 U. S., 179, and cases cited in the margin.

In Grand Trunk Western Ry. Co. v. South Bend supra, Mr. Justice Lurton Says:

"The power to regulate implies the existence. and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated *permanent,* and not *temporary, structures, granted a permanent, and not a revocable, franchise.* Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the state, though the power to regulate the use of the street has been delegated to the municipality. So that, while the company was itself authorized to select the route between the terminal points named in the charter, it could not use streets without the consent of the city through which the line ran. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconvenience of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent, except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition precedent had been performed, and the street franchise was

thereafter held, not from the city, but from the state; which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself."

Construction of the Statute Enacted by the North Carolina Legislature Authorizing Railroads to Construct Their Tracks in Streets.

In *Griffin v. Southern Ry. Co.*, 150 N. C., 312, the Supreme Court of North Carolina says:

> "The Revisal, section 2567 (5) expressly grants to railroad companies the right to use the streets of a town or city with the assent of the corporation of such city. The assent of the city to the use of Beech Street by the defendant railroad companies for this purpose has been given by resolution of its Board of Aldermen. The city clearly possessed the statutory right to assent to the use of the streets by the railroad company. This is often a most essential power, necessary to be used for the benefit of the people of the city."

In *V. & C. S. R. Co. v. S. A. L. Ry.*, 161 N. C., 531, a proceeding by one railroad to condemn a right of way across the track of another railroad for the purpose of constructing a spur track to several industrial plants, the court, in upholding this right of condemnation, says:

> "The general act, Revisal 2556 (5) and (6) confers on every railroad the power to construct its road along or upon any stream of water, street, highway turnpike, railroad, or canal which the route of its road shall intersect or touch."

The section of the Revisal referred to in this quotation, which is taken verbatim from Volume 161, page 531, of the North Carolina Reports is evidently intended for Sec-

tion 2567(5) and (6). This will be shown by reference to the two sections.

The statutes of West Virginia and Wisconsin, which are similar to the North Carolina statute, have been held to authorize the construction of the tracks of a railroad along a street.

> Arbenz v. Railroad, (W. Va.) 5 L. R. A., 371;
> Sinnott v. Railroad, 81 Wis., 95.

> "The right of the N. Y. Central & Hudson River R. R. Co., as now exercised to maintain tracks in Tenth, Eleventh and Twelfth Avenues and West Streets in the city of New York was originally derived from the state, through the legislature, and not from the city, by a franchise which was not limited in its duration. The legislature intended that the right should be enjoyed by the successors of the grantee, and, hence, the railroad company is entitled to an injunction restraining the city and its officers from removing or attempting to remove such tracks."
>
> N. Y. C. & H. R. R. v. New York, 202 N. Y. 212.

For a strong case directly in point on the question of the right of the plaintiff to maintain this track, see:

> Port of Mobile v. R. R., 84 Ala., 115.

Legislative authority, conditioned upon the consent of the municipality has been held by this court to create a contractual right to maintain tracks in a public street which is protected by the contract clause of the Federal Constitution.

> Grand Trunk Western Ry. v. South Bend, 227 U. S. 544.

> "The state, with its plenary control over the streets, had this governmental power to make the grant. There

was nothing contrary to public policy in any of its terms and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 17. Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, can not be treated as unlawful, either in maintenance or operation. As said by this court: 'A railway over . . . the streets of the city of Washington may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded.' *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331. The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the State. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure."

Grand Trunk Western Ry. Co. v. South Bend, *supra*.

In *Griffin v. Southern Ry. Co., supra* the Supreme Court of North Carolina upheld the right of the railroad to occupy a street for the purpose of maintaining a spur track to the union station in the town of Goldsboro.

The Track on Salisbury Street is a Public Use.

Since the operation of the compress was stopped in 1906, this track has been used exclusively for the public in receiving and delivering freight and in placing cars thereon. When

the compress was in operation, there was a period of several months in each year, when the work of compressing cotton ceased and at such times the track was devoted exclusively to other purposes. The facts agreed leave no doubt as to the public character of this track. But if it were used merely for the purpose of transporting cotton to and from the cotton compress, its use would nevertheless be public.

In a very recent case, in which this question is discussed, Mr. Justice Hughes says:

> "It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are subject to the regulation of public authority. As was said by this court in *Hairston v Danville & W. R. Co.* 208 U. S. 598, 608: 'The uses for which the track was desired are none the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *State, De Camp, Prosecutor v. Hibernia Underground R. Co.* 47 N. J. L. 43; *Chicago,*

B. & N. R. Co. v. Porter, 43 Minn. 527; *Ulmer v Lime Rock R. Co.* 98 Me. 579; *St. Louis, I. M. & S. R. Co. v. Petty,* 57 Ark. 359; *Dietrich v. Murdock,* 42 Me., 279; *Beaford Quarries R. Co. v. Chicago I. & L. R. Co.,* 175 Ind., 303."

Union Lime Co. v. Chicago & N. W. R. Co., 34 S. C. Rep., at page 525.

If the railroad obtained the consent of the city of Raleigh to place this track in the street, the right to maintain it cannot be affected by the opinion of the city or abutting property owners that its use is not important or necessary to the proper operation of the railroad. The railroad is the judge of the necessity and extent of its use:

Railroad v. Olive, 142 N. C., page 276.
Railroad v. Lumber Co., 114 N. C., 690.

This case can be distinguished from *Butler v. Tobacco Co.,* 152 N. C., 416.

There the track was laid in the street for the purpose of serving a single industrial plant and it was held to be for a private use.

In Elliott on Streets and Roads, it is said to be clear that a municipality under general power giving it control over streets cannot permit the use of streets where the railroad is for the private use of an individual, citing the Butler case.

The Supreme Court of North Carolina has recently upheld the principle that a spur track to an industrial plant is a public use.

State v. Railroad, 153 N. C., 563.

And it is generally held that if a track is open to the public upon equal terms it is a public use.

Ulmer v. Railroad, 66 L. R. A., 387.
Clarke v. Blackmar, 47 N. Y., 150.

The Usefulness of Salisbury Street is not Unnecessarily Impaired.

It is said that Salisbury Street has not been restored "to such state as not unnecessarily to have impaired its usefulness." This contention was made in the case of *Arbenz v. Railroad,* 5 L. R. A., 371, construing the West Virginia statute on this subject, and we submit that the opinion of the Supreme Court of West Virginia contains a complete answer to such contention .

In this case it is held that:

> "Under the provisions of our statute, Section 50, Chapter 54, of the Code of 1887, a railroad company, with the assent of the municipal authorities, may construct and operate its railroad along a public street of a city in a cut or excavation below the common level of the remaining portion of the street, in such manner as will appropriate a portion of the street to the exclusive use of the railroad company, provided such excavation does not occupy the entire street or such considerable portion thereof as would substantially prevent the use of the street by the general public, and provided, further, that it does not unnecessarily impair the usefulness of the street as a highway for the general public."

The language of the West Virginia act authorizing the use of streets by railroads will be found to be identical with the language of Section 2567(5) of the Revisal of North Carolina of 1905, which as it originally appeared in the Code, was enacted in 1883. In considering the extent to which a

street can be impaired by the construction of a railroad therein, Snyder, P. J., in the *Arbenz Case,* says:

"The grade of a railroad necessarily embraces considerations of convenience, expense and facility of construction and operation, and is fixed at a particular point with reference to grades at other points. It is therefore not only proper and reasonable, but almost indispensable, that railroad companies should be allowed a very large discretion in the location and fixing the grades of their roads. It seems to me to be a fair presumption that when the Legislature granted to railroad companies the right to occupy and use the streets of cities, towns and villages of this State, it intended that they should have the privilege of constructing their roads, to a large extent, in their own way, and of passing along and upon, or crossing the street, over, under or at grade, provided they should not unnecessarily impair the usefulness of the street. *People v. New York Central and H. R. R. Co.,* 74 N. Y., 302; *Adams v. Saratoga & W. R. Co.,* 11 Barb., 414, 450.

"This construction of our statute is greatly strengthened by the qualification herein which prohibits railroads from occupying any street without the assent of the municipal authorities. It is very safe to assume that the city authorities will be careful to protect their streets from any improper use by a railroad company; and that, in giving their assent to the use of a street, they will do so in such a manner as will, in the least possible degree, impair its usefulness. It is certainly possible that, under some circumstances, it may be more practicable and cause less inconvenience to the public, and do less injury to the abutting lot owners, to allow the railroad to occupy a portion of the street at a grade below or above the grade used by the general public than would be the case if the grade of the street was changed

by lowering or elevating it to the necessary grade of the railroad.

"Therefore, unless it clearly appears that the municipal authorities have abused their discretion by allowing such occupation of the street as will unnecessarily impair its usefulness, it seems to me it would be very unwise and improper for the courts to undertake to supervise their action. *Plant v. Long Island R. Co.*, 10 Barb., 26. . . . The use of the word 'unnecessarily' in the statute clearly implies that the usefulness of the street may be to some extent impaired. But this certainly does not mean that the street should be rendered useless. The streets of cities are public highways, and as such under the control of the State alone, and the State may grant the use of them against the will of the municipality. The city alone cannot grant to a railroad the privilege of using its streets, as the power is in the Legislature. The Legislature may discontinue the use of streets without restraint from private citizens claiming to be interested in the continuance of the street as adjoining owners or otherwise. The control of city streets may be properly delegated to the city authorities, with discretion to impose conditions on the use of the street, but the power is not in the city unless expressly delegated. Mills, Eminent Domain, Section 202; *Covington Street R. Co. v. Covington*, 9 Bush., 127.

"In the case before us, it appears that Twentieth Street is not materially obstructed, nor is its usefulness unnecessarily or unreasonably impaired. The facts show that the present width of the graded portion of the street in front of the plaintiff's property is only twenty-four feet, and that after the proposed excavation is made for the defendant's railroad the unobstructed portion of the street will still be twenty-two feet, thus showing that but two feet of the present open and graded part of the street will be occupied by the railroad. As before

stated, there is nothing in the record of this case to show that this is either an unnecessary or unreasonable appropriation or use of the street; and therefore we must hold that it is authorized by the statute, and the use and occupation of it by the railroad company in the manner aforesaid will not constitute a nuisance. *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala., 413; 2 Dillon Municipal Corporations, Sections 711, 564."

In his opinion in the instant case District Judge Connor says:

"To the suggestion that the occupation of the sidewalk on the eastern side of Salisbury Street does not unnecessarily impair the usefulness of the street, because there is a space of forty-three feet between curbs and thirteen feet sidewalk on the western sidewalk, it is sufficient to say that the control of the streets, in these respects, is committed to the Board of Commissioners of the city, and not to the courts. If the Board has the power to remove the track from the sidewalk, it is neither the province nor within the power of the Court to question its wisdom or propriety." (Printed Record, page 25.)

The plaintiff advances the contention that the usefulness of the street is not unnecessarily impaired in support of its position that the authority to occupy the street is granted by statute and for the purpose of coming within the requirement of the statute (The Code, Sec. 1957(5)) that the railroad company shall restore the street "to such state as not unnecessarily to have impaired its usefulness." This goes to the question of plaintiff's right in the street, and is, therefore, independent of any control of the commissioners of the street, except in the exercise of the police power, which would not include the power to destroy plaintiff's rights.

That the usefulness of the street is not unnecessarily impaired would seem to be demonstrated by its condition re-

maining unchanged for thirty-two years before the commissioners of the city manifested any interest in it, and by the further fact that the commissioners in authority in 1881 expressly referred to the *sidewalk* on the east side of Salisbury Street in granting permission to occupy the street. No street along which a railroad track is constructed can be restored to its former state, and the use of such street is *necessarily* impaired.

The Occupation of the Street Under Legislative Authority is a Contract Right in Perpetuity.

In the recent case of *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S., 58, Mr. Justice Lurton states the rule in this Court with respect to the duration of a grant of this character as follows:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property

rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People v. O'Brien,* 111 N. Y., 42—a decision accepted and approved by this Court in *Detroit v. Detroit Citizens' Street R. Co.,* 184 U. S., 368, 395: 'The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made, and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the Court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the Court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.' Dillon Municipal Corporations (5th ed.), Section 1265."

In the case of *Boise Artesian H. & C. Water Co. v. Boise City,* 230 U. S., 84, the plaintiff in error claimed the right to maintain its water pipes in the streets of the city of Boise under the following ordinance:

"An ordinance granting Eastman Brothers the right to lay water pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their water-works, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes, in, through, and along and across the streets and alleys of Boise City, under the surface thereof, but they shall, at all times, restore and leave all streets and alleys, in, through, along, and across which they may lay such

pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Sec. 2. This ordinance shall take effect from and after its passage and approval.

Approved, October 3, 1889."

This ordinance was accepted, and the grantees named therein immediately began the construction of their plant. Later, in July, 1890, similar street rights were granted to a corporation of Idaho known as the Artesian Water & Land Improvement Company. This last-named company accepted the ordinance and expended much money in the construction of another water supply system. At some date prior to 1895, apparently on March 28, 1891, each of these grantees conveyed and assigned all of their rights, franchises, and easements to the plaintiff in error. Subsequently the plaintiff in error made large expenditures in improving the plants acquired from its predecessors, and maintained its pipes in the streets, and continuously furnished water to the city for its purpose and to private consumers. In June, 1906, the Common Council of Boise City enacted an ordinance requiring the water company to pay a monthly license of $300 for the use and occupancy of the streets in furnishing water to the residents of that city. The water company complained that the ordinance of 1906 was an impairment of the street rights acquired under the ordinance of 1889, and the length of the occupancy of the streets. In referring to the rights granted by the ordinance of 1889, Mr. Justice Lurton says:

> "The grant of the right to lay water pipes upon the streets for the purpose of distributing water, found in the ordinance of October 3, 1889, purports to be nothing more than a grant of the right to occupy the streets of the city with the distributing pipes of the water company. It was accepted, and about $200,000 has been expended in the construction of the necessary works and

the laying of its system of pipes under the streets. The assertion of the right to require the company, after so many years of occupation, to pay a monthly rental for the use of the streets, is grounded upon the claim that under the grant to the Eastmans it had obtained nothing more than a revocable license, and its occupation of the streets was therefore subject to be terminated at any time.

"The right which is acquired under an ordinance granting the right to a water company to law and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable, and will pass under a mortgage sale of the property franchises of the company which owned it."

In *Old Colony Trust Co. v. Omaha,* 230 U. S., 100, the principal question was whether an ordinance containing the following language created a franchise or merely a revocable license:

"The New Omaha Thompson-Houston Electric Light Company, or assigns, is hereby granted the right of way for the erection and maintenance of poles and wires, with all appurtenances thereto, for the purpose of transacting a general light business through, upon, and over the streets, alleys and public grounds of the city of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance."

It was held that this ordinance created a right in perpetuity and that it was not revocable at the will of the city of Omaha.

"The grant of a right to use a street when accepted and acted upon is or becomes an irrevocable contract, and it cannot ordinarily be revoked by the municipality."

Elliott on Roads and Streets, Section 1053.

"The right to construct and operate tracks on a street

may be granted for a larger period than the charter duration of the corporation which takes the grant; and where there is no express limitation of time specified in the charter or ordinance giving the right, it is granted in perpetuity and exists forever."

4 Cook on Corporations 913.

In the case of *New York E. L. Co. v. Empire City Subway Co.*, 235 U. S., 179, it appears that:

"The plaintiff in error was incorporated in the year 1882, under a general law of the State of New York (Laws of 1848, chap. 265, as amended by Laws of 1853, chap. 471). Its certificate of incorporation stated, among other things, that it was incorporated for the purpose of 'owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets . . . of the cities of New York and Brooklyn,' and 'for the purpose of owning franchises for laying and operating the said lines of electric conductors.' Chapter 483 of the Laws of 1881 had authorized any company so incorporated 'to construct and lay lines of electrical conductors underground in any city,' provided that it 'first obtain from the common council' of such city the 'permission to use the streets' for the purposes set forth. The permission in question, which, as already stated, was granted by the common council of the City of New York, on April 10, 1883, was (omitting parts not here material), as follows:

" 'Resolved, that *permission* be and hereby is granted to the New York Electric Lines Company, to lay wires or other conductors of electricity, in and through the streets, avenues, and highways of New York city, and to make connections of such wires or conductors under-

ground by means of the necessary vaults, test boxes, and distributing conduits, and thence above ground with points of electric illuminations or of telegraphic or telephone signals in accordance with the provisions of an ordinance . . . approved . . . December 14, 1878.'

"It was also resolved that the company should not 'transfer or dispose of the franchise hereby granted without the further authority of the common council.'" (Italics added.)

While the Court held that the right conferred by this resolution was lost by nonuser, it was decided that the language of the resolution granted contractual rights which, when accepted and acted upon, could not be impaired by any subsequent action on the part of the municipality. In the opinion of this Court, Mr. Justice Hughes says:

"The State Court, in its opinion in the present case, said that the question 'remaining to be determined' was whether 'the relator, under the resolution of the common council of April, 1883, has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution.' Did a 'bare acceptance' of the permission operate to vest an irrevocable franchise? 201 N. Y., p. 329. This question was answered in the negative in the view that such a permission is 'a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed,' as contemplated by the permission, 'sufficient to create a right of property and thus form a consideration for the contract.'

"The plaintiff in error challenges this view, insisting that, by virtue of the city's permission, it is the grantee of an irrevocable franchise in the city's streets; that this franchise was derived from the State; that when the

consent of the city was given, as provided in the statute, the grant became immediately operative and could not thereafter be revoked or impaired by municipal resolution or ordinance; that the granted right, however named, is property, and, as such, is inviolable; and that this position is supported by numerous decisions both of the State Court and this Court, which are cited in the margin. Thus, in *Ghee v. Northern Union Gas Co.*, 158 N. Y., 510, 513, referring to the legal effect of the consent of the municipal authorities under a statute empowering the corporation to lay gas conduits in streets, on such consent, the Court said: 'It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise.' And in *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 659, where a corporation was authorized to erect poles, etc., over the streets with the consent of the general council of the city, it was held that the charter franchises became 'fully operative' when the city's consent was obtained. 'Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but howsoever designated, it is property.' Id., p. 661. Again, in the recent case of *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S., 58, 65, it was said: 'That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this Court to need more than a reference to some of the later cases.' See also *Boise Artesian Hot & Cold Water Co. v. Boise City,*

230 U. S., 84, 91. These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfil the manifest intent of the Legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise, when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made, and there was nothing but a license, which might be withdrawn at pleasure. Grants like the one under consideration are not *nude pacts,* but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See the Binghamton Bridge Case (*Chenango Bridge Co. v. Binghamton Bridge Co.*), 3 Wall. 51, 74; *Pearsall v. Great Northern R. Co.,* 161 U. S., 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance. The case of *Capital City Light & Fuel Co. v. Tallahasse,* 186 U. S., 401, to which the defendant in error refers, is not opposed. There the complainant, upon the ground of an exclusive privilege, sought to enjoin a municipality from operating its own electric light plant; although ten years had elapsed since the complainant's grant, the complainant had done nothing whatever to establish an electric light business, and under the express terms of the statute the exclusive privilege had not attached (Id., p. 410)."

This Right Is Protected by the Contract Clause of the Federal Constitution.

In *Grand Trunk Western Ry. Co. v. South Bend,* 227 U. S. 544, it is held that:

> "A municipal corporation could, in Indiana, confer by ordinance trackage rights in city streets upon a railway company whose charter provided that the railroad might be built through any city that would give its consent.
>
> "Rights acquired by a railway company under a valid municipal ordinance conferring trackage rights in the city streets, though subject to the power of the municipality to pass reasonable police regulations, are protected by the contract clause of the Federal Constitution from destruction by a subsequent repeal."

Whether the right to construct this track in Salisbury Street is granted by the municipal authorities of the city of Raleigh under general or specific power, or whether it is granted by statute and made effectual by the assent of the municipality, such right is protected by the Federal Constitution from impairment by the ordinance directing the removal of the track. Numerous authorities in this court, reference to which has been made, hold that a right so granted and accepted creates a contract within the meaning of the contract clause of the constitution.

Judge Dillon, in his standard work on Municipal Corporations Sec. 1242 says:

> "An ordinance of a city, made pursuant to legislative authority granting the right to use the streets of a city for a railroad, is when accepted and acted upon by the grantee, a contract within the protection of the Federal Constitution and new conditions cannot in the absence of a reserved power be imposed on the exercise of the right granted except so far as these conditions may be authorized by the exercise of the police power."

A resolution has the same effect as an ordinance:

> Street Railway Co. v. Des Moines, 151 Federal, 854.
> Southern R. R. v. Portland, 177 Fed. 959.

We submit in conclusion that the contractual right of the Seaboard Air Line Railway to maintain its track in Salisbury Street will be impaired and destroyed by the ordinance adopted by the commissioners of the city or Raleigh on June 10, 1913, as follows:

> "Upon the hearing of the matter of the removal of the spur track of railroad used by the Seaboard Air Line Railway and situated on the street and sidewalk on the east side of North Salisbury Street in the city of Raleigh, between Jones and Lane Streets, it is
>
> "Ordered that the chief of police of the city of Raleigh notify the said Seaboard Air Line Railway to remove said spur track, cross ties and rails and all other material constituting said track from said street and sidewalk within thirty days from the date of this order.
>
> "It is further ordered that if the said Seaboard Air Line Railway shall fail to remove said spur track within the said thirty days, that the Commissioner of Public Works of the city of Raleigh be, and he is hereby authorized, empowered and directed to forthwith remove said spur track, cross ties, rails and all other material from said street and sidewalk at the cost and expense of the said Seaboard Air Line Railway."

If we are correct in this position, it follows from the well settled decisions of this Court that this ordinance is invalid and its enforcement should have been enjoined by the District Court. We submit that the judgment of the District Court should be reversed.

We append a map of the location of this track for the information of the Court. This map was not in evidence at

the hearing in the District Court, and is not official, but is intended merely to assist the Court in more readily understanding the facts. The track in controversy is indicated by the red line extending along the street marked Salisbury, between Jones Street and Lane Street.

Respectfully submitted,

MURRAY ALLEN,

Counsel for Appellant.

Commercial Printing Co., Brief and Record Printers, Raleigh.

MAPS

TOO

LARGE

FOR

FILMING

SUBJECT INDEX

CITATIONS

QUESTIONS IN THE CASE

1. The permit to the Raleigh & Gaston Railroad Company to occupy the sidewalk in question was temporary.
2. The Board of Aldermen of the City of Raleigh did not have the right to make the grant.
3. Right to obstruct the sidewalk not given by statute.
4. Commissioners of city have right to order removal.
5. Assent of city will not be assumed by reason of lapse of time.
6. Occupation of sidewalk by railroad created no contractual rights.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

SEABOARD AIR LINA RAILWAY
Appellant

v.

THE CITY OF RALEIGH and James I. Johnson, O. G. King, and R. B. Seawell,
Commissioners of the City of Raleigh.

No. 330

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR DEFENDANTS—APPELLEES.

STATEMENT OF THE CASE.

The Statement of the Case as contained in the brief of the appellant is substantially correct.

ARGUMENT.

The jurisdiction of the United States District Court is admitted by the appellees, and therefore, the case before the court turns upon other points.

On the 5th day of August, 1881, the Board of Aldermen of the City of Raleigh, granted permission to the Raleigh & Gaston Railroad Company, which it is admitted was the predecessor of the Seaboard Air Line Railway, to occupy the sidewalk on the east side of Salisbury street between Jones and

Lane streets for railway purposes, said permission being in the following language:

"Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of running a track."

I.

The Foregoing Permit to the Raleigh & Gaston Railroad Company to Make Use of the Sidewalk in question Was Temporary in Its Nature and Did Not Embody the Idea of the Granting of a Permanent Franchise.

It appears from the facts agreed that the track in question when constructed in 1881 was used in connection with the cotton compress in the cotton season, and was used for the purpose of a team track at other times.

The terms used by the Board of Aldermen in granting permission to the Raleigh & Gaston Railroad to use this sidewalk, in themselves show that it was the intention of the Board to grant a mere temporary permission, and not to confer a franchise in perpetuity on the railroad. The informality of the whole proceeding tends to show this; nothing further than the quotation above appears on the minutes of the Board. No vote was taken by the Board. There was no consideration. The sole object seems to have been to accommodate the Raleigh & Gaston Railroad by giving it convenient access to a cotton compress on its property. It is well known that cotton is a heavy and unwieldy commodity, and to be handled economically, trucking distances must be short. It follows that the railroad would use the track on Salisbury street for loading and unloading freight when the cotton season was over. Taking all these matters into consideration, it certainly raises a grave doubt whether it was the intention of the Board of Aldermen to grant to the railroad the right to occupy and use the sidewalk in question in perpetuity.

This being the case, the doubt must be resolved in favor of the public and against the railroad.

Minturn v. Larue, 23 How., 435.

In *Holyoke Co. v. Lyman*, 15 How., 500 (512), Mr. Justice Clifford said: "Wherever privileges are granted to a corporation, and the grant comes under revision in the court, such privileges are to be strictly construed against the corporation and in favor of the public and nothing passes but what is granted in clear and explicit terms."

Mr. Justice Harlan, in the case of *Knoxville Water Co. v. Knoxville*, 200 U. S., 22, said: "It is true that the cases to which we have referred, involved in the main, the construction of legislative enactment, but the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect to matters which concern the public The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by implication. If by contract, or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words, so clear as not to admit of two different or inconsistent meanings." See also:

Railroad v. Railroad, 77 U. S. (19 L. E.), 849.
Davis v. Mayor, 14 N. Y., 514.
27 Am. & Eng. Enc., 154.

II.

The Board of Aldermen Did Not Have the Right to Make Grant.

The Board of Aldermen of the City of Raleigh did not have the power to grant to the Raleigh & Gaston Railroad the right to make exclusive use of the sidewalk in question. The Charter of the City of Raleigh, at the date of the ordinance of August 5, 1881, conferred the following powers upon the Board of Aldermen in respect to the streets:

"That the Commissioners shall cause to be kept clean and in good repair streets, sidewalks, and alleys. They may establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them."

The above seems to be about the general and customary authority given to the governing bodies of towns and cities in respect to their streets. The words, "and may reduce the width of all of them," cannot be construed to mean that the Board of Aldermen had the power to give the railroad the right to make exclusive use of a street or part of a street. Whatever rights the railroad acquired were to be reasonable and not inconsistent with the rights of the public.

Griffin v. R. R., 150 N. C., 312.
Moore v. Power Co., 163 N. C., 300.
Power Co. v. Colorado Springs, 105 Fed., 1.

An examination of the authorities shows that the rights, privileges and powers given a railroad or a public service corporation on the streets of a town must be reasonable and not inconsistent with the rights of the public.

In the case at bar, the Board of Aldermen, if we accept the railroad's point of view, attempted to give to the Raleigh & Gaston Railway the exclusive privilege to use the sidewalk on the east side of Salisbury street, between Jones and Lane streets, to the absolute exclusion of the public.

Pedestrians, who it is admitted use the eastern sidewalk of Salisbury street in going to and from the business part of the city, are obliged to cross to the western sidewalk between Jones and Lane streets for the reason that the sidewalk between these streets on the eastern side is taken up entirely by the railroad track.

It is freely admitted that a steam railroad has the right to make a reasonable use of a street, not inconsistent with the rights of the public, and that where the governing body of a

municipal corporation has authority to grant such railroad a franchise for such purpose, it is entirely proper for it to do so, but it is earnestly contended that the governing body of a town under the very general powers quoted above (from the Charter of the City of Raleigh) would not have the power to grant a railroad the exclusive right to maintain a side track on a sidewalk within one block of the State Capitol, compelling pedestrians to abandon that side of the street completely.

III.

Right to Construct Sidetrack Not Given by Statute.

The appellant contends that its occupation of this sidewalk is validated by Revisal 1905, Sec. 2567, Sub-sec. 5, which is as follows:

"All existing railroads shall have power to construct their road across, along, or upon any stream of water, water course, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plankroad or turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness." Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

It is contended that general statutory authority does not benefit the appellant for two reasons:

a.

The statute requires the railroad making use of the street to restore the street, when intersected or touched, to its for-

mer state, or to such state as not unnecessarily to have impaired the usefulness. Upon this point District Judge Connor says: "Conceding, for the reasons assigned, *pro hac vice*, that the plaintiff has the rights and privileges conferred by this section, free from the limitation in regard to 'the assent of the corporation,' it is confronted with the duty imposed by the statute to restore the . . . thus intersected or touched, to its former state, etc. It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road 'across, along, or upon' a street, always of much greater width than a railroad track, and the cross ties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible to restore the street to 'its former state' if the track occupies its entire width? Statutes must be given a reasonable construction."

b.

Section 2567, sub-sec. 5 of the Revisal of N. C., was enacted by the State Legislature in the Session 1871-'72, and had reference to all railroads chartered under the provisions of the act. The Raleigh and Gaston Railroad was already in existence, and therefore this act had no reference to that road. The permission to construct the side track on Salisbury street between Jones and North streets was secured in 1881, and the provision of section 2567, sub-section 5 (Sec. 19820 of the Code of 1883) was not extended to all railroads until 1883, after permission to occupy the sidewalk had been granted.

Whatever rights the railroad acquired were of a contractual nature, and must be construed in the light of statutes existing at the time of the grant.

IV.

Commissioners of the City Have Right to Order Removal.

The present charter of the City of Raleigh, which was in force when the ordinance of 1913, ordering the removal of the side track was adopted, gives the Commissioners of the City the following power:

"To direct, contract and prohibit the laying of railroad tracks, turnouts and switches in the streets, avenues and alleys of the city, unless the same shall have been authorized by ordinance," etc. (Printed record, page 17.)

It is argued by the appellant that this is an inhibition upon the power of the commissioners of the City of Raleigh to order the removal of tracks from the public streets when such tracks "shall have been authorized by ordinance."

This argument of course assumes that the railroad is located on the sidewalk under a valid ordinance. The proposition assumed as true is the main point in controversy.

V.

Assent of the City of Raleigh Will Not be Assumed by Reason of Lapse of Time.

It is argued by plaintiff that the right to occupy the sidewalk in perpetuity is conferred upon it by acquiescence on the part of the city for a long period of time.

This argument assumes that the Board of Aldermen had the right to grant the exclusive use of the sidewalk in the beginning. This is denied. If the right to grant exclusive use of this sidewalk did not exist in the Board of Aldermen in the first instance, and such we earnestly contend is the case, the railroad has maintained a public nuisance in its occupancy of this sidewalk, and could acquire no property rights by user under such circumstances.

The Supreme Court of North Carolina has repeatedly held that no title to a street could be acquired by adverse possession.

Turner v. Commissioners, 127 N. C., 153.
Moore v. Carson, 104 N. C., 431.

Revisal of North Carolina, 389, which is as follows:

"No person or corporation shall ever acquire any exclusive right to any part of any public road, street, lane, alley, square, or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of any encroachment upon or obstruction of or occupancy of any public way it shall not be competent for any court to hold that such action is barred by any statute of limitations."

The case of *Turner v. Commissioners,* 127 N. C., 153, relied upon by plaintiff is not in point, for the reason that the property acquired in that case by adverse possession was not a street, but part of a common, which was alienable by legislative act. Indeed, in delivering the opinion in that case, the Court held that statutes of limitation do not run against a municipal corporation holding land in trust for public use unless it has the power of alienation.

VI.

Occupation of Sidewalk by Railroad Created No Contractual Rights.

This phase of the case has been elsewhere touched upon, but it may be well to here give it further consideration.

In the first place the permission granted for a special purpose, to-wit: to afford shipping facilities to the cotton compress was temporary in its nature, and the permission was granted as a favor, not as a contractual right. This is shown by the extreme informality of the proceedings. The rail-

road company must have so considered it at the time, or otherwise it is argued it would have safeguarded its interests by securing its grant in a proper manner and more formally, and in the second place it is argued that even if the Board of Aldermen had so desired they could not have given exclusive permission to use this sidewalk in perpetuity. If they had the power to allow the railroad company to occupy this sidewalk for a block, they had power to grant the use of the sidewalk for the whole length of the street, or for that matter to allow the use of the sidewalk for the whole length of any street in Raleigh. This manifestly would be beyond their powers.

In this connection it is well to consider the language of the statute, Revisal, Sec. 2567, Sub-section 5, which plaintiff claims gives authority for the grant of such a franchise.

"To construct its road across, along, or upon any stream of water, watercourse, street, highway, plank road, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the stream or watercourse, street, highway, plank road and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstructions across, in, or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon, or across any streets in any city without the assent of the corporation of such city."

The occupation of a sidewalk for loading or unloading box cars and storing empty box cars thereon renders the sidewalk utterly useless for other purposes. A railroad may cross a street or run along the middle of a street, and while it is an encumbrance it does not totally destroy the usefulness of the street. In the present case it is admitted that pedes-

trians have to cross the street to the sidewalk opposite this sidetrack, in using this part of Salisbury street.

In conclusion we respectfully call the attention of the Court to the fact that the cases quoted by the plaintiff to sustain its position on this phase of the case are not in point.

In the case of *Owensboro v. Cumberland Telephone Company,* 230 U. S., 58, the language of the ordinance under which the corporation claimed its franchise is specific and free from all ambiguity. In that case the telephone company was granted the right to erect and maintain its poles upon the streets of the town. It was expressly stipulated that the grant should not be exclusive and certain duties were assumed by the company, inuring to the benefit of the citizens of the town.

This is likewise true in the case of *Boise Artesian H. & C. Water Company v. Boise City,* 230 U. S., 84; *Old Colony Trust Company v. Omaha,* 230 U. S., 100, and other cases relied on by the plaintiff in error.

Respectfully submitted,

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The general principle reiterated that what seems on its face a mere license by a municipality may not be converted into a contract by resort to general implications.

The exception which allows duration and contractural quality to be attributed by implication alone to particular privileges, whose continued enjoyment is vitally and essentially related to enduring powers and duties of a corporate grantee, has no application to a case like this, where the action of the city, concerning a mere permission to exercise a facility as a license, occurred long after the railway corporation was created and established in business and was in no way necessary for the discharge of its corporate functions.

Long occupation and use of the spur track for railroad purposes, with the assent of the city, could not create a permanent right.

219 Fed. Rep. 573, affirmed.

THE case is stated in the opinion.

Mr. Murray Allen for appellant.

Mr. Jno. W. Hinsdale, Jr., for appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Upon the assumption that contract rights protected by the Constitution of the United States would be violated, the bill sought to restrain the enforcement of an ordinance which directed the removal of a spur track on a sidewalk on a designated street and block. On the bill, answer and on agreed facts the court refused an injunction on the ground that there was no contract right in existence and, treating this conclusion as going to the vitals of the whole case, dismissed the bill, and a direct appeal was taken.

Although there are fourteen assignments of error, but one question arises, Was there a contract, since leaving out mere forms of statement all the assignments concern this single question and we come to its solution. In doing

so, to avoid that which is superfluous, we concede for the sake of the argument only that the city had the lawful authority to make a contract concerning the track on the street and sidewalk in question. With this argumentative concession the question then is, not what there was power to do, but what was done, and to solve it requires a brief statement.

In 1835 the Raleigh & Gaston Railroad Company, to whose rights it is conceded the complainant and appellant succeeded, was authorized to and shortly afterwards built a railroad from Gaston to Raleigh, North Carolina. Entering the latter city through its streets with its consent and building therein machine shops, a railroad yard and other facilities, the main tracks of the railroad curved into a block which the company had bought and upon which it established its terminals, bounded on the front or west by Salisbury street, on the rear or east by Halifax street, and on the north and south by North and Lane streets. Many years subsequently, in 1881, on the block just below and on the same side of Salisbury street a cotton compress had been built fronting on Salisbury street and abutting on the sidewalk on that street. In that year the railroad company asked permission of the city authorities to extend a track to and along the sidewalk on the block in front of the compress, which was granted, the official record of the consent of the city having been manifested by the following entry in the minutes of the Board of Aldermen: "Upon application of John C. Winder, General Superintendent, the Raleigh and Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of running a track." In virtue of this consent a spur track projecting from the main tracks as they curved into the terminal block, was built which ran down to and upon the sidewalk in front of the compress. For

many years this track was used for business going in and out of the compress, as well as for the general purposes of the railroad. In 1906, however, the compress ceased to be operated, and subsequently (about 1910 or 1911) the railroad company, owning the block on which the compress was situated, removed the same and built upon the block a warehouse. It was not possible, however, from the track on the sidewalk to directly reach such warehouse, as along the block where it fronted on Salisbury street tracks were laid between the warehouse and the spur track which for the purposes of the railroad were depressed below the level of the street and sidewalk, and thus the spur track on the sidewalk was only available for parking cars or as a team track and was alternately in use for one or the other of these purposes when the city adopted the assailed ordinance directing the removal of the spur track.

Under this statement it becomes at once apparent that the court below rightly decided that the contract right asserted had no existence since on the very face of the consent which was given a mere right to occupy was conveyed without any contract as to time and which therefore, taking the best view for the railroad, amounted to conferring upon it a mere license to put and use a track upon the sidewalk and therefore subject to the power of the city to revoke whenever it deemed the municipal interest required it to do so.

But the contention is that although it be conceded that the well-settled rule is that general implications may not be resorted to for the purpose of converting a grant of a municipality which is upon its face a mere license into a contract for a stated period or in perpetuity, nevertheless that rule is subject to a well-defined limitation or exception which as presented in the argument in various forms may be stated as follows: That where general powers are conferred and duties are imposed upon

a corporation which from their nature and essential character presuppose the right to exert them or the duty to perform them during a specified time or in perpetuity, and a particular power or right is conferred on the corporation which has a necessary relation thereto or an essential connection therewith, although such particular power or right may not have expressly taken the form of contract or grant for a stated time or in perpetuity, nevertheless such result may be implied by considering the essential relation which the particular power or right granted bears to the general powers and duties possessed and the necessary connection between the two for the purpose of giving a common duration to both. *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 663; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65–66; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 91; *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, 191–194.

But while the general rule is well founded and the exception or limitation by which it is asserted to be qualified is well settled, it has no relation to the case in hand, since the particular action of the city in question concerned a mere permission to exercise a facility as a license given long after the creation of the railway corporation and not inherently or in any degree necessarily controlling its power to discharge its corporate attributes. Indeed so much is this the case on the face of the situation here presented that it becomes apparent that to apply the limitation to a case like this would destroy the general rule itself.

The contention that even though this be the case, in as much as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and assent of the city, thereby the existence of a contractual and permanent right must be inferred, is manifestly without

merit. Indeed it amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractual and permanent.

Affirmed.

SEABOARD AIR LINE RAILWAY *v.* CITY OF RALEIGH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

No. 59. Argued November 1, 1916.—Decided November 20, 1916.

Herein the action of the Board of Aldermen of the City of Raleigh in assuming to grant to a railroad company "permission to occupy" a sidewalk with a spur track is *held*, in the circumstances stated in the opinion, to have amounted at most to the conferring of a mere revocable license.